GODFREY & KAHN S.C.

24th Annual Labor & Employment Law Update

Spring 2013

GODFREY & KAHN S.C.

24th ANNUAL LABOR & EMPLOYMENT LAW UPDATE: SPRING 2013

AGENDA

April 11 – Monona Terrace, Madison
April 17 – Lambeau Field Atrium, Green Bay
April 24 – InterContinental Hotel, Milwaukee

7:30 - 8:00 a.m.	Registration
8:00 - 9:15 a.m.	Labor & Employment Law Update
9:15 - 9:25 a.m.	Break
9:25 - 10:40 a.m.	Union and Non-Union: Preparing Your Company for Today's Activist National Labor Relations Board
10:40 - 10:50 a.m.	Break
10:50 - 12:00 p.m.	Break-out Session
12:00 p.m.	Adjourn/Networking

2013 Labor & Employment Law Update

This popular session will provide you with the latest information on recent case law and legislative developments.

Presented by:

- Madison: **Jon Anderson** and **Tom Shorter**
- Green Bay: **John Haase**
- Milwaukee: **Christine Liu McLaughlin**

Union and Non-Union: Preparing Your Company for Today's Activist National Labor Relations Board

This presentation will provide attendees with an outline of the legal framework for the Board's authority, summarize recent significant decisions and rulemaking initiatives issued by the Board, and provide guidance on what employers can anticipate from the Board over the next three-and-a-half years.

Presented by:

- Madison: **Jon Anderson**
- Green Bay: **Margaret Kurlinski** and **Rufino Gaytán**
- Milwaukee: **John Kalter** and **Margaret Kurlinski**

24th ANNUAL LABOR & EMPLOYMENT LAW UPDATE: SPRING 2013

Break-out Session:

Restrictive Covenant Trends and Ways Your Business Can Take Advantage of Them

This presentation will highlight for attendees some of the recent trends in the drafting and enforcement of confidentiality, non-competition and other restrictive covenant provisions. Among other things, attendees will learn about the effect of the Wisconsin Supreme Court's Star Direct decision on the drafting and enforceability of restrictive covenants, the inclusion of restrictive covenants in employee equity awards such as stock options, the continued importance of boilerplate language in restrictive covenant agreements, and potential trends forecast for the restrictive covenant arena in Wisconsin and nationwide.

Presented by:

- Madison: **John Kalter**
- Green Bay: **James Prosser**
- Milwaukee: **John Kalter** and **Rufino Gaytán**

OR

Developments in the Law of Arrest and Conviction Record Discrimination: How to Manage Them to Avoid Liability

Attendees at this presentation will learn the general rules of Wisconsin's arrest/conviction anti-discrimination law, the contours of the law's "substantially related" test and practical considerations in addressing situations involving arrests and convictions. Attendees will learn about cases in this area that highlight practical principles in addressing applicants and employees with arrest and conviction records. This presentation will also educate attendees on the recent focus of the Equal Employment Opportunity Commission on employee arrests and convictions as they related to discrimination claims at the federal level. Attendees will walk away from this presentation with practical tools, practices and considerations to manage the risks associated with applicant and employee arrests and convictions.

Presented by:

- Madison: **C. Wade Harrison** and **M. Scott LeBlanc**
- Green Bay: **Annie Eiden**
- Milwaukee: **Christine Liu McLaughlin** and **Rebeca López**

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2012-2013 Labor and Employment Law Developments

Hot Button Issues

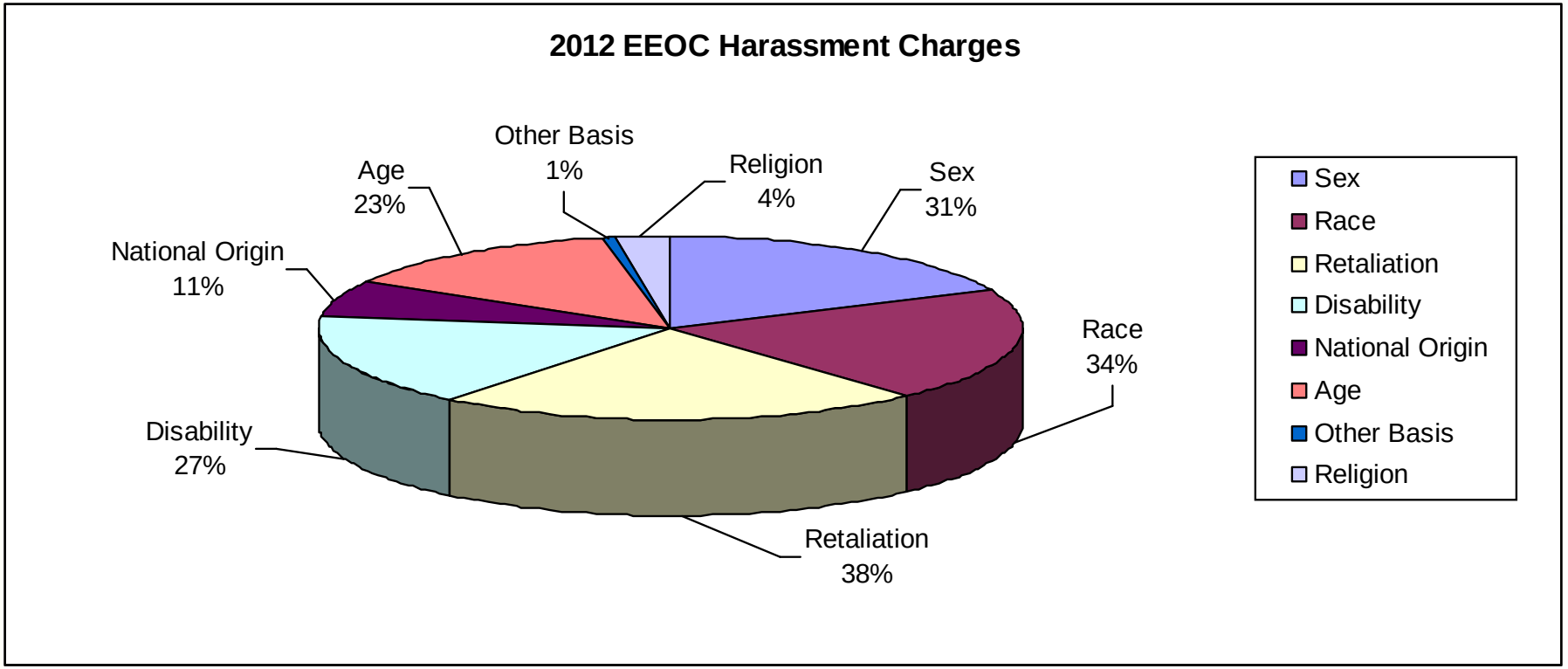
1. Planning for Health Care Change

Hot Button Issues

2. NLRB – Social media & appointments to the Board

Hot Button Issues

3. EEOC – Record set & new statistic format



Hot Button Issues

4. Department of Labor – “Good jobs for everyone”

Hot Button Issues

5. OSHA – Inspection Plan – site specific

Hot Button Issues

6. OFCCP – Equal Pay investigative tactics expand

Hot Button Issues

7. Immigration – Jan. 29, 2013 bill

Agency Enforcement Activities

- EEOC Decision Says Transgender Workers are Protected by Title VII.

  Macy v. Holder, et. al., EEOC Appeal No. 0120120821 (April 20, 2012).

- EEOC Issues New Guidance Applying Title VII and ADA to Domestic Violence, Sexual Assault and Stalking.

  www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm

Agency Enforcement Activities

- EEOC's Guidance Tells Employers that Criminal Screens Must be Job-Related.

  www.eeoc.gov/laws/guidance/arrest_conviction.cfm

- EEOC's Informal Discussion Letter Underscores GINA's Confidentiality Requirements.

  www.eeoc.gov/eeoc/foia/letters/2012/gina_confidentiality_of_medicalgenetic_information_2.html

Agency Enforcement Activities

- DOL's Revisions to FMLA Regulations.
  www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf

- DOJ Pursues Civil Penalties for Violation of Immigration and Nationality Act.

- HHS Publishes Final HIPAA Rule Redefining Definition of Breach.

U.S. Supreme Court Docket

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

Patient Protection and Affordable Care Act ("PPACA") and Health Care Education Reconciliation Act ("HCERA") challenges.

U.S. Supreme Court Docket

Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156 (2012).

Pharmaceutical representatives can be exempt.

U.S. Supreme Court Docket

Arizona v. United States, 132 S.Ct. 2492 (2012).

Arizona's immigration law struck down.

U.S. Supreme Court Docket

Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S.Ct. 2277 (2012).

New "Hudson Notice" labor rule.

U.S. Supreme Court – On the Horizon

- Vance v. Ball State Univ., 646 F.3d 461 (7th Cir. 2011), *cert. granted*, 133 S.Ct. 23 (U.S. June 25, 2012) (No. 11-556).

  Scope of employer liability in harassment claims.

- Sandifer v. U.S. Steel Corp., 678 F.3d 590 (7th Cir. 2012), *cert. granted*, 2013 WL 598470 (U.S. Feb. 19, 2013) (No. 12-417).

  Definition of "clothes" under the FLSA.

Seventh Circuit Highlights

Abner v. Illinois Dep't of Transp., 674 F.3d 716 (7th Cir. 2012).

A state employee is barred from litigating his Title VII retaliation claim for failure to assert an earlier charge.

Seventh Circuit Highlights

EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

ADA mandates disabled employees be placed in vacant positions.

Seventh Circuit Highlights

Halasa v. ITT Educ. Servs., Inc., 690 F.3d 844 (7th Cir. 2012).

False Claims Act whistleblower claim defeated by lack of knowledge of internal complaints.

Seventh Circuit Highlights

May v. Chrysler Grp., 692 F.3d 734 (7th Cir. 2012).

$3.8 million punitive damages claim reinstated.

Seventh Circuit Highlights

James v. Hyatt Regency Chicago, 707 F.3d 775 (7th Cir. 2013).

No duty to provide light duty to employee who is unable to return to essential functions of job, with or without reasonable accommodation.

NLRB Case Law Developments

Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

Recess appointments invalidated; leads to no quorum, no power to order.

NLRB Case Law Developments

Banner Health Sys. d/b/a Banner Estrella Med. Ctr., 358 NLRB No. 93 (July 30, 2012).

Confidentiality directive may be unfair labor practice.

NLRB Case Law Developments

WKYC-TV Inc., 359 NLRB No. 30 (Dec. 12, 2012).

50-year old rule tossed, obligation to check off union dues continues after expiration of union contract.

NLRB Case Law Developments

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (Dec. 14, 2012).

Facebook-related terminations reversed.

NLRB Case Law Developments

Miklin Enters., Inc. d/b/a Jimmy John's, No. 18-CA-19707, 2012 WL 1387939 (NLRB Apr. 20, 2012).

Even disparaging remarks on Facebook are protected.

Other Cases of Interest

Chenzira v. Cincinnati Children's Hosp. Med. Ctr., No. 11-917, 2012 WL 6721098 (S.D. Ohio, Dec. 27, 2012).

"Veganism" may constitute religious belief under Title VII.

Other Cases of Interest

Lineberry v. Richards and Detroit Med. Ctr., No. 11-13752, 2013 WL 438689 (E.D. Mich. Feb. 5, 2013).

Facebook photos support termination of employment for FMLA fraud.

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ALL IN A DAY'S WORK

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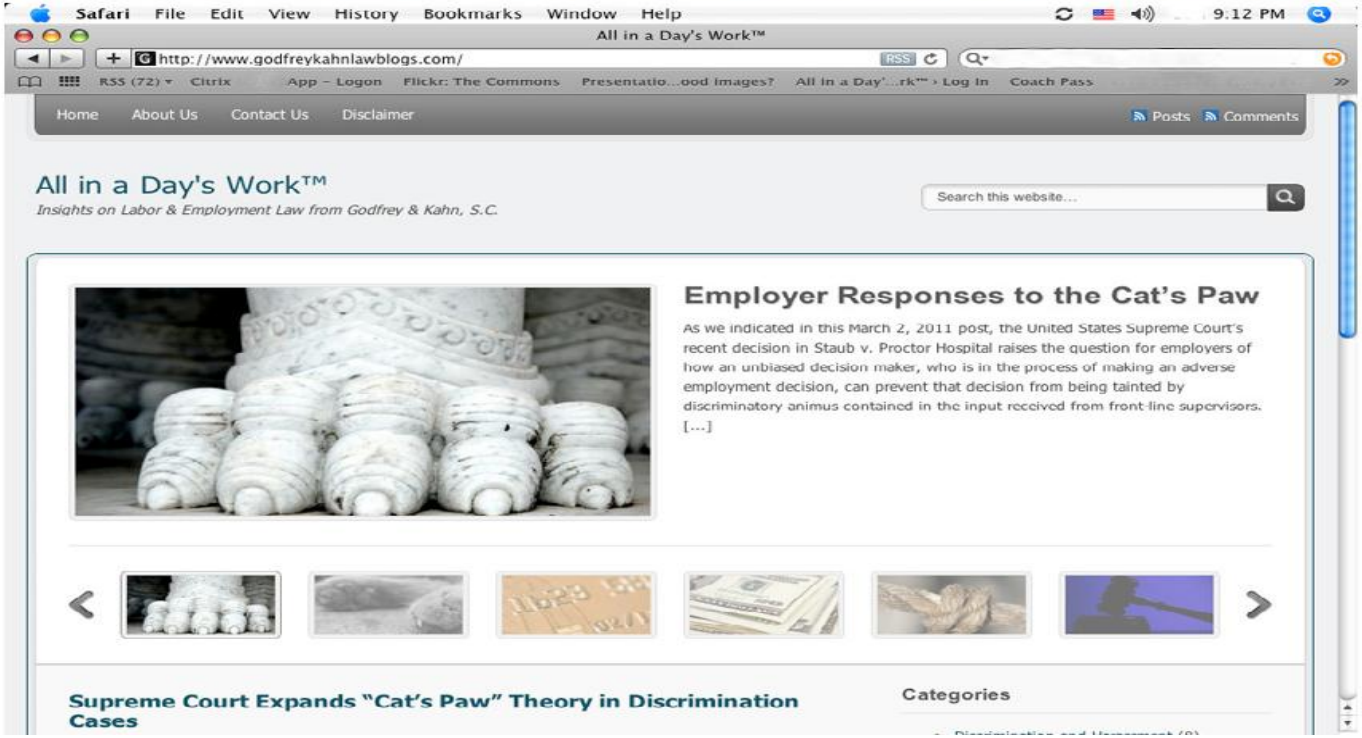

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24TH ANNUAL LABOR & EMPLOYMENT LAW UPDATE
SPRING 2013

2012-2013 LABOR AND EMPLOYMENT LAW DEVELOPMENTS

GODFREY & KAHN S.C.

2012-2013 LABOR AND EMPLOYMENT LAW DEVELOPMENTS

I. HOT BUTTON ISSUES – SETTING THE STAGE FOR 2013.

A. Ongoing Planning For Health Care Changes.

1. By 2014, employers with 50 or more full-time employees must offer health coverage to full-time employees.

2. Employers will have to weigh the costs of maintaining health insurance coverage as compared to the cost of the "penalty" under the health care law – the proverbial "pay or play."

B. Continued Focus On Social Media.

1. There continues to be social media cases before the National Labor Relations Board ("NLRB").

2. Who owns an employee's professional social media account (e.g., LinkedIn)?

3. Legislative intervention at the state level banning employers from requiring job candidates or current workers to disclose their usernames or passwords for social networking sites.

C. What's Up With The NLRB?

1. Senior slots need to be filled and court challenges are pending regarding the validity of President Obama's prior NLRB recess appointments.

2. Questions regarding the legitimacy of recent board decisions and rules.

3. After the slots are filled and the court issues are addressed, the NLRB will be controlled by Obama appointees.

4. There has been a shift in the NLRB's focus to regulation of employment policies.

D. Equal Employment Opportunity Commission's ("EEOC") Record Breaking Year.

1. In November 2012, the EEOC announced that 2012 was a record year for recoveries against employers.

    a. The EEOC tracked $365.4 million in monetary damages from employers.

    b. This was the *highest level* of monetary relief ever reported.

2. Each year, the EEOC posts on its website a summary of the total number of individual discrimination charge filings. (*See* Appendix A).

   a. *See* www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

   b. The largest number of charges filed occurred in 2010, with 99,922 total charges filed. The total number of filings dropped slightly in 2011 to 99,947 and again to 99,412 in 2012.

3. EEOC releases new format of discrimination statistics.

   a. On January 28, 2013, the EEOC released, for the first time, a summary showing the type of discriminatory action alleged by statute. The most current data presented in the table covers fiscal years 2010 through 2012 and catalogs the various issues under Title VII, ADEA, ADA, EPA and GINA. (*See* Appendix B).

   b. *See* www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm

   c. For Title VII, the most frequently challenged employment action in 2012 was discharge with 36,408 charges. Terms and conditions of employment had a significantly lesser number of second-place filings with 18,686 charges. Both totals logged lesser numbers than those posted for 2011. Wages was one of the few Title VII charge types to rise – it increased from 4,717 in 2011 to 6,240 in 2012.

   d. Discharge was also the most highly contested employment action under ADA (23,908 total charge filings in 2012). The ADA also posted increases in the total number of charges from 2011 to 2012 related to reasonable accommodation, terms and conditions of employment, harassment, discipline, constructive discharge, suspension, and intimidation.

   e. Under the ADEA, discharge was also the most frequently challenged with 14,701 total charge filings in 2012. The ADEA also had increases in the number of charges from 2011 to 2012 in terms and conditions of employment, harassment, discipline, hiring, promotion, and constructive discharge.

E. Department of Labor's ("DOL") Continuing Focus On Jobs.

1. DOL's renewed vision of "good jobs for everyone" as set forth in its strategic plan.

   a. *See* www.gol.gov/_sec/stratplan/StrategicPlan.pdf.

   b. Jobs that increase incomes and narrow inequality.

c. Jobs that assure workers are paid their wages and overtime.

d. Jobs in safe and healthy workplaces, and fair and diverse workplaces.

e. Jobs that provide health benefits and retirement security.

f. Jobs that assure employees have a voice in the workplace.

g. Jobs that facilitate return to work for workers experiencing workplace injuries or illnesses.

2. With the re-election of President Obama, DOL's "Right to Know" rule is expected to re-emerge as a major issue.

3. For the period ending March 31, 2012, the number of FLSA lawsuits filed reached a new high of 7,064. This number exceeded the 7,008 cases that were filed during the preceding period.

F. OSHA Releases Annual Inspection Plan.

1. On January 4, 2013, the Occupational Safety and Health Administration ("OSHA") released its Notice to implement the 2012 "Site-Specific Targeting" and, as part of the Notice, announced that at least 1,260 randomly selected workplaces will be inspected.

2. OSHA will be using this inspection program to focus its enforcement resources on businesses with the most incidences of workplace injuries and illnesses.

G. Office of Federal Contract Compliance Programs ("OFCCP") Expands its Equal Pay Investigative Tactics.

1. On February 28, 2013, the OFCCP formally rescinded two of its 2006 enforcement guidance documents on pay discrimination (Compensation Standards and Voluntary Guidelines) because the guidance limited the OFCCP's "ability to conduct full investigations and use every enforcement tool at its disposal to combat pay discrimination."

2. The new Compensative Directive has been developed to align the OFCCP's analysis of pay discrimination with the principles used to enforce Title VII and allows the OFCCP to "conduct more rigorous, effective and consistent review of employer pay practices":

a. Determine, on a case-by-case basis, the right approach or combination of tools to use in a particular investigation.

b. Investigate systemic, smaller unit and individual discrimination and possibly seek remedies for compensation discrimination regardless of whether the individual workers know they are being underpaid.

c. Review and test the factors a contractor uses in making compensation decisions – experience or job-related element such as tenure in position.

H. Immigration.

1. On January 29, 2013, a bipartisan bill targeting employment-based immigration was introduced by Senator Orrin Hatch (R-Utah), Senator Amy Klobuchar (D-Minn.), Senator Marco Rubio (R-Fla.), and Senator Chris Coons (D-Del.).

    a. The Immigration Innovation (I2) Act of 2013 would enact changes that would greatly aid employers in their efforts to employ alien employees and would aid alien employees, and their employers, in their efforts to obtain permanent residency.

    b. The bill proposes to:

        i. Increase the H-1B cap from 65,000 to 115,000.

        ii. Establish a market-based H-1B escalator that would allow for additional H-1B slots in years with high demand.

        iii. Allow for unlimited H-1B slots for individuals with United States advanced degrees.

        iv. Allow for spouses of H-1B holders to obtain employment authorization.

        v. Exempt certain categories of individuals from employment-based green card cap, including United States STEM advanced degree holders, persons of extraordinary ability and outstanding professors and researchers.

        vi. Allow for unused permanent residence slots from prior years to be recaptured.

        vii. Eliminate annual per-country limits for employment-based visas.

2. The U.S. Citizenship and Immigration Services ("USCIS") published a new version of Form I-9 in the March 8, 2013 Federal Register.

    a. Employers will have until May 7, 2013 before they will be penalized for not using the new form.

    b. It is available on the USCIS "I-9 Central" webpage.

II. AGENCY ENFORCEMENT ACTIVITIES, REGULATORY AGENDA AND OPINION LETTERS.

A. EEOC Decision Says Transgender Workers Are Protected By Title VII.

1. Mia Macy was a transgender woman who was denied a job as a ballistics technician by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Macy v. Holder, et. al., EEOC Appeal No. 0120120821 (April 20, 2012).

2. During the initial telephone interview Macy presented herself as a man. Macy was told that she would be awarded the position, contingent on her background check. She was later contacted by the outside contractor conducting the background check and, after that initial contact, Macy informed the contractor that she was in the process of transitioning from male to female. Five days later, Macy was informed that, due to federal budget reductions, the position was no longer available. Macy immediately contacted the ATF's EEO Counselor and was told that the position had been filled by someone else who was further along in the background investigation process. Macy filed a formal EEO complaint with the ATF. In response to her complaint, the ATF stated that claims of gender identity discrimination cannot be adjudicated before the EEOC. She appealed to the EEOC.

3. The Commission clarified, noting that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."

4. The EEOC stated "[t]hat Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex . . . . If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."

B. EEOC Issues New Guidance Applying Title VII and ADA to Domestic Violence, Sexual Assault and Stalking.

1. On October 12, 2012, the EEOC issued a new Q&A fact sheet regarding applicants or employees who experience domestic or dating violence, sexual assault or stalking and how Title VII and/or the ADA might apply to those individuals.

2. *See* www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm.

3. The EEOC's guidance is clear – there are numerous possible situations where applicants and employees who are victims of domestic violence, sexual

assault or stalking can find protections under federal non-discrimination laws.

4. Examples noted in the Q&A include:

   a. An employer might violate Title VII if it terminates an employee after learning she has been subjected to domestic violence, saying the employer fears the potential "drama battered women bring to the workplace."

   b. An employer who does not select a male applicant when it learns that the applicant obtained a restraining order against a male domestic partner might also violate Title VII.

   c. An employer might violate the ADA if, after it searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for depression, decides to not hire her based on a concern that she may require future time off for continuing symptoms or further treatment of depression.

   d. An employer might violate the ADA if, after receiving a request for reasonable accommodation from an employee because she is being treated for post-traumatic stress disorder resulting from incest, her supervisor tells her co-workers about her medical condition. Because the ADA prohibits disclosure of confidential medical information, a supervisor's sharing of the information may violate the law.

C. EEOC's Guidance Tells Employers That Criminal Screens Must Be Job-Related.

1. On April 25, 2012, the EEOC issued "Updated Enforcement Guidance" regarding criminal screens. EEOC's guidance provides that an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII.

2. *See* www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

3. The guidance focuses on the potential for race and national origin discrimination and discusses the differences between arrest and conviction records.

   a. Arrests.

      i. The fact of an arrest does not establish that criminal conduct has occurred.

      ii. Being denied employment based on an arrest, in itself, is not job related and consistent with business necessity.

iii. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

b. Convictions.

i. A conviction record will usually serve as sufficient evidence that a person engaged in particular conduct.

ii. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

4. The EEOC believes employers will "consistently meet the 'job related and consistent with the business necessity' defense" if it develops a "targeted screen" process which:

a. Considers the nature of the crime;

b. Considers the time elapsed since the crime; and

c. Considers the nature of the job.

D. EEOC's Informal Discussion Letter Underscores GINA's Confidentiality Requirements.

1. A December 12, 2012 EEOC informal discussion letter is a reminder that, under the Genetic Information and Nondisclosure Act ("GINA"), lawfully obtained genetic information about applicants, employees, and former employees must be maintained in separate medical files and treated as confidential.

2. *See* www.eeoc.gov/eeoc/foia/letters/2012/gina_confidentiality_of_medicalgenetic_information_2.html.

3. GINA prohibits discrimination on the basis of genetic information. "Genetic information" includes, among other things, information about an individual's genetic tests and information about the manifestation of disease and disorder in family members, i.e., family medical history.

E. DOL's Revisions to FMLA Regulations.

1. On February 5, 2013, the U.S. Department of Labor ("DOL") issued final regulations implementing statutory amendments to the Family and Medical Leave Act ("FMLA") and updated its FMLA poster to reflect the Final Rule's changes.

a. Beginning March 8, 2013, covered employers must display the revised version of the FMLA poster in conspicuous locations in the work place.

b. The updated poster can be accessed on DOL's website.

c. *See* www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

2. The regulations incorporate the amendments Congress passed in 2010 relative to military family and airline industry employees and expand qualifying exigency leave to cover not only family members who are members of the National Guard and Reserves, but also family members who are in the regular armed forces and are deployed to a foreign country.

3. The changes implemented with the Final Rule include:

a. Increase in the maximum number of days to 15 calendar days for exigency leave to bond with a military member who is on rest and recuperation leave.

b. Expands the post-deployment exigency to include leave to address issues that arise from the death of a military member while on covered duty status.

c. Creates a new qualifying exigency leave category for *parental care*. Similar to the childcare exigency provision, eligible employees may now take leave to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.

d. Expands the definition of *serious injury or illness* in the military caregiver leave to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty.

e. Expands military caregiver leave to care for covered veterans.

f. Defines *covered veteran* as an individual who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.

g. Adds a flexible definition of *serious injury or illness of a covered veteran* to include four alternatives – only one of which must be met.

h. Expands the list of authorized health care providers from whom an employee may obtain a certification of the servicemember's serious injury or illness to include authorized health care providers as defined by the regulations.

i. Allows an employer to request a second and third opinion for medical certifications obtained from a health care provider who is not affiliated with the Department of Defense, the Department of Veterans Affairs, or the TRICARE network.

j. Provides that an airline flight crew employee will meet the hours worked eligibility requirement if he/she has worked or been paid for not less than 60% of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months.

F. DOL Guidance Regarding Request for Care of Adult Children.

1. A DOL Administrator's Interpretation was issued on January 14, 2013 because the Administrator determined that additional guidance was needed under the FMLA regarding the definition of "son or daughter" who has a disability and who is 18 years of age or older.

2. *See* www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI 2013_1.htm

3. A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

   a. Has a disability as defined by the ADA;

   b. Is incapable of self-care due to that disability;

   c. Has a serious health condition; and

   d. Is in need of care due to the serious health condition.

4. According to the Administrator's Interpretation, the age of a son or daughter at the onset of a disability is not relevant in determining a parent's entitlement to FMLA leave.

5. The Administrator's Interpretation provided the following examples:

   a. Example #1: An employee's 37-year old daughter suffers a shattered pelvis in a car accident which substantially limits her in a number of major life activities (i.e., walking, standing, sitting, etc.). As a result of this injury, the daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although she is expected to recover, she will be substantially limited in walking for six months. If

she needs assistance in three or more activities of daily living such as bathing, dressing and maintaining a residence, she will qualify as an adult "daughter" under the FMLA as she is incapable of self-care because of a disability. The daughter's shattered pelvis would also be a serious health condition under the FMLA and her parent would be entitled to take FMLA-protected leave to provide care for her immediately throughout the time that she continues to be incapable of self-care because of the disability.

b. Example #2: An employee's 25-year old son has diabetes but lives independently and does not need assistance with any ADLs or IADLs [adaptive or instrumental activities]. Although the young man's diabetes qualifies as a disability under the ADA because it substantially limits a major life activity (i.e., endocrine function), he will not be considered an adult "son" for purposes of the FMLA because he is capable of providing daily self-care without assistance or supervision. Therefore, if the son is admitted to a hospital overnight for observation due to a skiing accident that does not render him disabled, his parent will not be entitled to take FMLA leave to care for him because he is over the age of 18 and not incapable of self-care due to a mental or physical disability.

If the son later becomes unable to walk and is also unable to care for his own hygiene, dress himself and bathe due to complications of his diabetes, he will be considered an adult "son" as he is incapable of self-care due to a disability. The son's diabetes will be both a disability under the ADA and a chronic serious health condition under the FMLA because his condition requires continuing treatment by a doctor (e.g., regular kidney dialysis appointments). If his parent is needed to care for him, his parent may therefore take FMLA-protected leave to do so.

6. The Administrator's Interpretation also addressed the impact of FMLA leave to care for adult children wounded in military service. Specifically, the Interpretation noted that, because of the expanded definition of a disability under the ADAAA, as well as the clarification in the Interpretation that when an adult son's or daughter's disability commences is not determinative of whether he or she qualifies as a "son or daughter" under the FMLA, parents of adult children who have been wounded or sustained an injury or illness in military service may be allowes to take FMLA leave beyond that provided under the special military caregiver leave provision of the statute.

G. Department of Justice ("DOJ") Pursues Civil Penalties for Violation of Immigration and Nationality Act ("INA").

1. On January 7, 2013, the United States DOJ announced that Centerplate, Inc. had agreed to pay a $250,000 civil penalty to resolve allegations that it

violated the anti-discrimination provision of the INA. Centerplate has also agreed to fully compensate any victims for lost wages.

2. Specifically, the DOJ alleged that Centerplate engaged in a pattern or practice of treating work-eligible non-citizens differently from United States citizens in the employment eligibility verification process by requesting that non-U.S. citizens show specific documents to demonstrate work eligibility.

3. This settlement is a reminder to employers – permit employees completing the Form I-9 to select and show any acceptable document, or combination of documents, to demonstrate their identity and work eligibility. The list of acceptable documents, which may change with each revision of the Form I-9, is listed on the reverse side of each edition.

4. Recommendations:

   a. Ensure that the form being used is always the most current edition.

   b. If in doubt, review or download the current edition from the U.S. Citizenship and Immigration Services' (USCIS) website at www.uscis.gov (type Form I-9 in the search box).

H. HHS Publishes Final HIPAA Rule Redefining Definition of Breach.

1. On January 25, 2013, the U.S. Department of Health and Human Services ("HHS") published a final rule revising the definition of "breach" under the Health Insurance Portability and Accountability Act's ("HIPAA") Privacy, Security and Enforcement Rules.

2. HHS's change sets forth a four-part risk assessment that evaluates the probability that the protected health information has been compromised.

   a. The nature and extent of the protected health information involved, including the types of identifiers and the likelihood of reidentification.

   b. The unauthorized person who used the protected health information or to whom the disclosure was made.

   c. Whether the protected health information was actually acquired or viewed.

   d. The extent to which the risk to the protected health information has been mitigated.

3. The final rule kept the three statutory exceptions to the definition of breach.

III. U.S. SUPREME COURT 2012-2013 LABOR/EMPLOYMENT DECISIONS AND PENDING DOCKET CASES.

A. Most provisions of the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act ("HCERA") passed the U.S. Supreme Court's scrutiny and remain the law. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

1. PPACA was enacted by Congress in early 2010 in order to increase the number of Americans covered by health insurance and decrease the cost of health care. President Obama signed PPACA on March 23, 2010. There are two key provisions of PPACA that were the focus of the suit:

    a. The requirement that most Americans maintain "minimum essential" health insurance coverage for themselves and their tax dependents in each month beginning in 2014. Those who do not comply with the individual mandate will owe a financial penalty, known as the "shared responsibility payment" to the federal government. This penalty will be paid to the Internal Revenue Service with an individual's taxes and shall be assessed and collected in the same manner as tax penalties.

    b. An expansion in scope of the Medicaid program and increasing the number of individuals the states must cover. While PPACA provides increased funding to states to cover the costs in Medicaid's expansion, PPACA also penalizes those states who do not comply with the new coverage requirements by withdrawal of federal funding of the new requirement, as well as all of a state's federal Medicaid funds.

2. The day President Obama signed PPACA, the State of Florida filed a lawsuit in federal district court challenging the constitutionality of PPACA's individual mandate and Medicaid expansion provisions. Florida was joined by 25 other states, as well as another group of plaintiffs including the National Federation of Independent Businesses. The U.S. District Court for the Northern District of Florida declared the entirety of PPACA as being invalid.

3. Defendants appealed. The Eleventh Circuit Court of Appeals upheld the Medicaid expansion as being a valid exercise of Congress' spending power, affirmed the unconstitutionality of the individual mandate and held that the individual mandate provision was severable from the remainder of PPACA. The remainder of the act remained intact.

4. The Supreme Court agreed to decide:

    a. The constitutionality of the two major provisions addressed by the previous courts – individual mandate and Medicaid expansion.

b. If the individual mandate was found to be unconstitutional, whether the mandate is severable, allowing the rest of the PPACA to remain in effect or whether, instead, all or part of the entire law must be invalidated along with the individual mandate.

c. If this was the appropriate time to rule on the PPACA's constitutionality based on whether the Anti-Injunction Act prevents courts from deciding lawsuits about the PPACA until taxpayers actually incur the financial penalty for failure to comply with the individual mandate.

5. On the last day of its 2011-2012 term, the Supreme Court issued its opinion regarding PPACA. As for the constitutionality of the individual mandate, the Court upheld the individual mandate.

a. A majority of the justices, including Chief Justice Roberts, held that the individual mandate was within Congress' power under the Taxing Clause (ability to exercise taxes). On this particular issue, the majority observed that the shared responsibility payment that is triggered by the failure to comply "looks like a tax" even though that's not how Congress labeled it. The Court reflected that it is a collection administered by the IRS, it is reported and paid when filing federal tax returns, and it does not apply to those who are not required to file tax returns because their income is too low, and it is calculated based on amount of taxable income, number of dependents, and tax filing status.

b. On dissent, Justices Scalia, Kennedy, Thomas and Alito concluded that the shared responsibility payment is imposed for violating a law (the individual mandate to obtain insurance). Therefore, the dissent believed that the shared responsibility payment is akin to a penalty and cannot be upheld under the taxing power.

c. Because the individual mandate was found to be constitutional, the Supreme Court did not have to address the severability issue

6. As for the constitutionality of the Medicaid expansion:

a. A group of three justices, including Chief Justice Roberts, found that the Medicaid expansion is a "gun to the head" because the "threatened loss of over 10 percent of a State's overall budget … is economic dragooning that leaves the States with no real option but to acquiesce." The Supreme Court ultimately held that the Medicaid expansion is unconstitutionally coercive of states because states did not have adequate notice to voluntarily consent and the Secretary could withhold all existing Medicaid funds for state non-compliance.

b. Another group of four justices found that the Medicaid expansion is unconstitutionally coercive of the states and is not severable from the rest of the law. Therefore, in their view, PPACA should have been invalidated in its entirety.

c. Justices Ginsburg and Sotomayor concluded that the Medicaid expansion was constitutional.

B. In a 5-to-4 decision, the U.S. Supreme Court ruled that pharmaceutical sales representatives could qualify as exempt outside sales employees because the employees obtain non-binding commitments from physicians to prescribe certain drugs, even though federal law precluded the sales representatives from making a sale. Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156 (2012).

1. SmithKline Beecham develops, manufactures and sells prescription drugs. Because prescription drugs can only be dispensed upon a physician's prescription, pharmaceutical companies such as SmithKline Beecham focus their direct marketing efforts on the physicians through a process called "detailing." Under this process, pharmaceutical sales representatives (detailers) provide information to physicians about the company's products in hopes of persuading them to write prescriptions for the products. Detailer positions have existed in the pharmaceutical industry in substantially its current form since at least the 1950's.

2. The action was initially filed in the United States District Court for the District of Arizona. SmithKline Beecham was granted summary judgment and, after the District Court issued its order, the petitioners filed a motion to alter or amend the judgment, contending that the court had erred in failing to accord controlling deference to DOL's interpretations of the regulations. The District Court rejected the argument and denied the motion.

3. The Ninth Circuit Court of Appeals affirmed the lower court's ruling.

   a. The court held that because the commitment that the sales representatives obtained from physicians was the maximum possible under the rules, the sales representatives did, indeed, make sales within the meaning of the regulations.

   b. The court also agreed that the DOL's interpretation was not entitled to controlling deference.

4. On appeal, the U.S. Supreme Court was presented with two questions for its determination:

   a. Whether courts must defer to the DOL's interpretation of its regulations addressing the "outside salesmen" exemption from the overtime requirements imposed on employers by the Fair Labor Standards Act.

b. Whether pharmaceutical sales representatives, who cannot themselves "sell" prescription drugs, are considered "outside salesmen" and thus not entitled to overtime pay under the Act.

5. The DOL filed an *amicus* brief, changing its historical course that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought."

6. Justice Alito delivered the Court's opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, ruling that pharmaceutical sales representatives "qualify as outside salesmen under the most reasonable interpretation of the [Department of Labor's] regulations."

   a. In this case, the DOL's *amicus* brief maintains that "[a]n employee does not make a 'sale' . . . unless he actually transfers title to the property at issue." The DOL asserted to the Supreme Court that this new interpretation of the regulations is entitled to "controlling deference."

   b. The Supreme Court's majority declined to defer to DOL's "interpretation in this circumstance [as it] would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct a regulation prohibits or requires.'"

   c. The Court further found that DOL's interpretation of its own regulations were unpersuasive, concluding that the agency's title-transfer theory "is flatly inconsistent with the FLSA" because the FLSA "defines 'sale' to mean, inter alia, a 'consignment for sale,'" under which title would not be transferred.

   d. With respect to the pharmaceutical industry, the Court held that what a pharmaceutical sales representative does—namely, obtain a non-binding commitment from a physician to prescribe certain drugs—"comfortably falls within the catchall category of 'other disposition'" given "the unique regulatory environment within which pharmaceutical companies must operate."

7. Justices Breyer, Ginsburg, Sotomayor and Kagan dissented, holding that the drug company detailers do not fall within the scope of the term "outside salesman."

C. The U.S. Supreme Court struck down three of the four contested provisions of Arizona's immigration law, known as SB 1070, settling questions regarding the role that states may play in the enforcement of federal immigration law. Arizona v. United States, 132 S.Ct. 2492 (2012).

1. Arizona Governor Jan Brewer argued that SB 1070 was a case "about every state's authority and obligation to act in the best interest and welfare of its

citizens." The law, enacted by the state of Arizona in 2010, had as its legislative intent "attrition through enforcement," meaning aggressive enforcement would make life so difficult for unauthorized immigrants that they would chose to self-deport. After the passage of SB 1070, other states passed legislation with similar provisions.

2. After Governor Brewer signed SB 1070, the Obama Administration filed suit, claiming that federal immigration law preempted the state's newly enacted legislation.

3. Section 5(C) of SB 1070 would have made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." The Supreme Court found that provision of Arizona's law to conflict with Congress' choice (in IRCA) to not impose criminal penalties on aliens who seek, or engage in, unauthorized employment. The U.S. Constitution's Supremacy Clause precluded this particular state law.

D. The Oklahoma Supreme Court misapplied the Federal Arbitration Act when it declared two ex-workers' noncompete employment agreements void because of state law, rather than letting an arbitrator assess their validity under a valid arbitration clause that existed between the parties. Nitro-Lift Techs LLC v. Howard, 133 S.Ct. 500 (2012).

1. An employment contract between Nitro-Lift and two of its former employees contained the following arbitration clause:

> Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in accordance with the rules existing at the date hereof of the American Arbitration Association.

2. After the two employees quit their employment and went to work for one of Nitro-Lift's competitors, Nitro-Lift served them with a demand for arbitration for breach of their noncompete agreements. The employees filed suit, asking the court to declare the noncompetition agreements null and void. The lower court dismissed the complaint, holding that the arbitration clause in the employment agreements was valid. The Oklahoma Supreme Court retained the appeal and ordered the parties to explain why, under Oklahoma law, the enforceability of the clauses should be limited.

3. Nitro-Lift argued that the dispute should be presented before an arbitrator to determine the enforceability of the contract. The Oklahoma Supreme Court held, despite other U.S. Supreme Court cases, that the "existence of an

arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."

4. In its *per curium* opinion, the Supreme Court simultaneously granted review, noting that, "despite this Court's jurisprudence, the underlying contract's validity is purely a matter of state law for state-court determination is all the more reason for this Court to assert jurisdiction" and vacated the state court's ruling as the "Oklahoma Supreme Court must abide by the [Federal Arbitration Act], which is the 'supreme Law of the Land.'"

5. Although a court can initially decide an arbitration provision's validity, the U.S. Supreme Court held that "the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide."

E. When a union representing public-sector employees imposes a special assessment or increases dues to meet expenses that were not disclosed when the original assessment was set, the union must provide a new "Hudson" notice. Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S.Ct. 2277 (2012).

1. States may establish "agency shop" arrangements for their public sector employees, under which a bargaining unit may decide, by majority vote, that all of the employees are represented by a union selected by the majority. Employees are not required to join the union; they must, however, pay an annual fee to address the chargeable expenses.

2. The U.S. Supreme Court has previously held that agency shop arrangements in the public sector trigger First Amendment concerns because the arrangement requires employees to contribute to the union as a condition of employment. Ultimately, such arrangements may be allowed, provided the union follows specific procedural requirements when collecting fees from nonmembers. Teachers v. Hudson, 475 U.S. 292 (1986). Hudson dealt with a regular annual fee.

3. In Knox, the Supreme Court was presented with a union's special assessment or dues increase that was levied to meet expenses that were not disclosed when the amount of the regular assessment was set.

4. Background:

   a. In 2005, the Union ("SEIU") sent its Hudson notice to the employees, estimating that 56.35% of the total dues would be dedicated to chargeable collective bargaining activities. As per Hudson, if a non-union employee objected to the full amount of union dues, within the 30-day notice period, he/she was only responsible for 56.35% of the total dues.

   b. SEIU's notice also stated that the agency fee was subject to increase at any time without further notice.

c. Shortly after distributing its Hudson notice, SEIU joined forces with a number of other public sector unions in California opposing certain ballot propositions that were presented to address California's on-going state budget deficits. Two of the issues were highly controversial and directly dealt with charging of union fees.

d. After the 30-day Hudson notice period had passed, SEIU proposed a temporary 25% increase in fees that were needed to fund its political agenda.

e. A class of non-union employees sued SEIU, alleging that the union improperly required the employees who had originally objected to the Hudson notice pay 56.35% of an assessment that was tied to political expenditures and improperly denied employees the opportunity to object to the special assessment.

f. The District Court granted summary judgment for the employees.

g. The Ninth Circuit reversed, holding that a balancing test must be employed to assess whether the procedure the union implemented reasonably accommodated the interests of the union, the employer, and the nonmember employees.

5. The Supreme Court was presented with two questions:

a. May a state, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a Hudson notice that includes information about that assessment and provides an opportunity to object to its exaction?

b. May a state, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?

6. The Supreme Court reversed, holding that under the First Amendment the government cannot mandate the funding of speech or political ideologies. In this case, supporting SEIU's position would require nonmembers to pay an additional fee for a union's political activities without giving them a chance to opt out. SEIU should have distributed a "fresh Hudson notice" prior to imposing the special assessments.

7. Justice Alito delivered the Supreme Court's opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined

8. Justice Sotomayor, joined by Justice Ginsburg, concurred. Justice Breyer dissented, noting that, as in Hudson, the SEIU in this case should not "be

faulted for calculating its fee on the basis of its expenses during the preceding year."

F. In a case coming from the Seventh Circuit, the U.S. Supreme Court will resolve the scope of employer liability in harassment claims. Vance v. Ball State Univ., 646 F.3d 461 (7th Cir. 2011), *cert. granted*, 133 S.Ct. 23 (U.S. June 25, 2012) (No. 11-556).

1. Vance appeals a Seventh Circuit Court of Appeals decision to affirm the lower court's granting of summary judgment in favor of Ball State. In addressing the merits of Vance's suit, the Seventh Circuit stated it found "no such ambiguity" holding that, under its own precedent, "[a] supervisor is someone who has the power to *directly* affect the terms and conditions of a plaintiff's employment." That means – the authority to hire, fire, demote, transfer, or discipline a worker. Without such clear authority, the employer cannot be vicariously liable for the acts of an alleged discriminator.

2. The Seventh Circuit also stated that it has "not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII." The "daily activities" theory is also one supported by the EEOC.

3. Because Vance could not establish that one of the individuals "had the authority to tell her what to do or that she [the co-worker] did not clock in like other hourly employees," Vance's claims against the employee must be evaluated as co-worker conduct rather than supervisory. Without the nexus to supervisory status, Vance's hostile environment claim fails.

4. A single question has been presented for the U.S. Supreme Court's consideration:

   Whether, as the Second, Fourth, and Ninth Circuits have held, the Faragher and Ellerth "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline their victim.

5. Oral argument was presented on November 26, 2012.

G. In another case coming from the Seventh Circuit, the U.S. Supreme Court will decide what is considered "clothes" under the FLSA. Sandifer v. U.S. Steel Corp., 678 F.3d 590 (7th Cir. 2012), *cert. granted*, 2013 WL 598470 (U.S. Feb. 19, 2013) (No. 12-417).

1. There are 800 former and current hourly workers in this class action, all of whom are members of a union who work at U.S. Steel's plant in Gary, Indiana, the largest integrated steel mill in North America. The plaintiffs allege that the company is violating the FLSA because it does not

compensate them for the time spent putting on and taking off their work clothes in a locker room.

2. Because of the large size of the plant, some of the workers travel to their work stations on buses. They return to the locker room and store their gear after the shifts are over. This process – changing and traveling – sometimes adds up to several hours per week. The collective bargaining agreement does not require compensation for such time, and apparently none of the collective bargaining agreements between U.S. Steel and the union required it.

3. The plaintiffs argue that the FLSA itself requires compensation and, if it does, overrides any contrary contractual provision. Specifically, the plaintiffs contend that the "highly specialized gear" they don and doff does not count as "clothes" under 29 U.S.C. § 203(o).

    a. The "clothes" in dispute consist of flame-retardant pants and jacket, work gloves, metatarsal boots, a hard hat, safety glasses, ear plugs, and a "snood" (hood that covers the top of the head, chin, and neck).

4. The district court and the Seventh Circuit rejected the plaintiffs' claims, noting that, given the terms of the collective bargaining agreement, U.S. Steel doesn't have to compensate its workers for the time they spend changing into and out of their work clothes.

5. The U.S. Supreme Court accepted review of the case, and, as noted in the plaintiff's petition to the Supreme Court, faces an issue that is split among the circuits:

    a. The Fourth, Sixth, Tenth and Eleventh Circuits have held that "clothes" includes anything an employee wears.

    b. The Seventh Circuit has held that not everything an employee wears is "clothes" and, thus, the § 203(o) exemption does not cover protective gear.

    c. The Ninth Circuit has held that protective gear is not included in the definition of "clothes."

6. The U.S. Supreme Court agreed to answer only the following question: What constitutes "changing clothes" within the meaning of section 203(o)?

IV. SEVENTH CIRCUIT CASE LAW DEVELOPMENTS ON LABOR/EMPLOYMENT MATTERS.

A. A state employee is barred from litigating his Title VII claim that he was terminated in retaliation for filing a race discrimination charge he had filed years earlier, even though he never claimed retaliation in a previous case, where he could have raised retaliation as defense in earlier proceedings. Abner v. Illinois Dep't of Transp., 674 F.3d 716 (7th Cir. 2012).

1. Abner was hired by the Illinois Department of Transportation ("IDOT") where, between 1989 and 2003, he was involved in a number of disciplinary altercations. In 2001, Abner filed a race discrimination charge. IDOT sought to terminate Abner for fighting in the workplace in 2003. He was instead placed on a last chance agreement. Two years later, Abner was involved in an altercation with a co-worker during which he pushed his supervisor. IDOT terminated Abner.

2. Abner challenged his termination through a civil service proceeding; the administrative law judge ("ALJ") concluded that the discharge was not warranted and proposed that Abner be suspended for 90 days. The Commission affirmed and adopted the ALJ's recommendation. IDOT appealed to circuit court which overturned the Commission's decision and upheld the discharge. During the appeal Abner did not make any allegation that IDOT's effort to discharge him was retaliatory.

3. Three years later, Abner secured a right to sue letter from the EEOC and filed a *pro se* complaint in federal court alleging that the true reason IDOT fired him was in retaliation for his 2001 race discrimination allegation. Acting on IDOT's motion to dismiss the complaint, the district court concluded that the complaint was barred by the doctrine of *res judicata*. Abner appealed to the Seventh Circuit, contending that the *res judicata* rationale was flawed.

4. The Seventh Circuit concluded that, because Abner did not allege retaliatory discharge during the administrative proceeding and, because the state court deemed that his discharge was warranted by just cause, the retaliation claim asserted before the court was precluded. Abner failed in suggesting that the state proceeding was limited to the events of 2005 (culminating in his 2005 discharge) and the federal suit had to do with the 2001 discrimination complaint. The two proceedings implicated two sides of the same coin.

B. The Seventh Circuit reverses its previous decisions and holds that the ADA does mandate that employers appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and wouldn't present an undue hardship for the company. EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

1. In United Airlines, the court addressed the issue in the context of a transfer policy that gave preferential treatment to a disabled employee seeking a transfer as an accommodation over an equally qualified applicant. In 2003, United Airlines codified its "Reasonable Accommodation Guidelines," a policy that gave preferential treatment to a disabled employee seeking a transfer as an accommodation over an equally qualified applicant. Under the policy, however, such a transfer would not be automatic. Presumably (the court's opinion does not clearly address this issue), United Airlines would not provide a transfer as an accommodation if an individual more qualified than the disabled employee also applied for the position.

2. The EEOC sued United Airlines, arguing that the disability-neutral transfer policy violated the ADA because it did not guarantee a disabled employee a transfer to an open position for which the disabled employee was qualified.

3. Since its decision in EEOC v. Humiston-Keeling (2000), the Seventh Circuit held that the ADA did not require employers to reassign disabled employees to open positions for which they are qualified. In Humiston-Keeling, the EEOC filed suit against the employer because the employer refused to reassign a disabled employee to a clerical position over other, more qualified applicants. The EEOC argued that the ADA requires employers to make such reassignments, so long as the disabled employee is minimally qualified for the position at issue. The court rejected this argument, holding instead that the ADA does not require employers to give preference to a disabled employee over a better-qualified applicant for the open position, provided the employer consistently hires the best applicant for the job.

4. With the facts presented in the present case, the Seventh Circuit remanded back to the district court, instructing the district court to apply the test codified by the U.S. Supreme Court in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

    a. In Barnett, the U.S. Supreme Court addressed a similar argument in the context of a seniority policy. The Court provided a two-step process to properly determine whether a particular accommodation was reasonable, based on each case's circumstances. First, the employee must show that the accommodation "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." Second, if the employee meets the first step, the burden shifts to the employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." In the end, the Court held that an employer's violation of its seniority policy "would not be reasonable in the run of cases."

    b. In Barnett, the employer's policy stated that reassignments to open positions would be based on seniority. When a disabled employee requested a reassignment due to his disability, the employer provided it. But, when two employees more senior than the disabled employee applied for a transfer to the position held by the disabled employee, the employer rejected the disabled employee from the position pursuant to the seniority policy. On review, the Court stated that the "simple fact that an accommodation would provide a 'preference' . . . cannot, in and of itself, automatically show that the accommodation is not reasonable."

5. The Barnett test "does not contain categorical exceptions." The Seventh Circuit court pointed out that the first step - whether the reassignment would be reasonable "in the run of cases" - was "the very accommodation analyzed in Barnett." To an extent, the court appears to have hinted that the Barnett

result should also apply to this case (stating that although no seniority system was involved here, "we suppose it is possible there is some comparable circumstance of which we are unaware"). The court also reiterated that the EEOC could still prevail if it could prove "that special factors make mandatory reassignment reasonable in this case."

6. Nevertheless, the Court added that the employee "remain[ed] free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." Thus, an employee's claim of failure to reasonably accommodate can prevail even if the employer "rebuts" the employee's initial showing that the accommodation "seems reasonable on its face."

7. In the present case, the Seventh Circuit flipped, reversing Humiston-Keeling and expressly adopting the Barnett two-step test. The court reviewed the language of 42 U.S.C. § 12111(9), which states that a "'reasonable accommodation' may include . . . reassignment to a vacant position[.]" In light of this language and Barnett, the court stated that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."

C. In a case before the 7th Circuit for the second time, the Court of Appeals upheld a jury verdict in favor of an elementary school teacher who alleged that the school violated the Americans with Disabilities Act by denying her requests to transfer to a windowed classroom that let in natural light. Ekstrand v. Dist. of Somerset, 683 F.3d 826 (7th Cir. 2012).

1. Renee Ekstrand taught elementary school for the School District of Somerset ("District") from 2000 to 2005. In the spring of 2005, she asked that her classroom be relocated so that she had exterior windows. Her requests were denied. In the fall of 2005, Ekstrand began to experience seasonal affective disorder symptoms and was subsequently on extended leaves of absence lasting over two school terms. During her initial 3-month leave of absence, a letter from her physician was delivered to the District's office, detailing his opinion that Ekstrand needed natural light. This letter supported Ekstrand's prior requests she had made to the superintendent and the principal for a new room with exterior windows.

2. Ekstrand sued the District alleging that it failed to accommodate her seasonal affective disorder symptoms in violation of the ADA. The District's motion for summary judgment was granted by the district court. The 7th Circuit reversed in part, holding that there was a triable issue of fact as to whether Ekstrand was a qualified individual with a disability within the meaning of the ADA and, whether the District was aware of that disability. That case went to trial and the jury returned a verdict in favor of Ekstrand. The District

moved for judgment, challenging the sufficiency of the evidence, the district court denied the motion, and the District appealed to the 7th Circuit.

3. The 7th Circuit's review in the instant case was limited to two specific challenges presented by the District:

   a. Whether there was sufficient evidence for a jury to find that Ekstrand was a qualified individual with a disability under the ADA.

   b. Whether there was sufficient evidence for a jury to find that the District knew of that disability within the relevant time period.

4. The Court easily answered both of these questions in the affirmative, noting that all of Ekstrand's evidence supported the jury's award in her favor.

D. A college director of a for-profit educational company lacks a False Claims Act whistleblower claim (for identifying and reporting irregularities in the company's handling of federal student loans and grants) because he cannot show the executives who fired him knew of his internal complaints. Halasa v. ITT Educ. Servs., Inc., 690 F.3d 844 (7th Cir. 2012).

1. ITT Educational Services ("ITT") is a for-profit corporation located throughout the United States. Jason Halasa was the College Director of the Lathrop (California) campus for six months in 2009. Halasa alleges he was fired in violation of the False Claims Act when he identified and reported several irregularities in the way ITT was handling its federally subsidized student loans and grants.

2. During his tenure with ITT, Halasa claimed he observed Lathrop campus employees engaging in unlawful recruiting and reporting practices and that student recruiters were inappropriately being paid on an incentive basis, that other employees were changing entrance exam scores of prospective students and that graduating students' employment statistics were being misreported.

3. On the other hand, ITT was receiving complaints about Halasa's job performance and reports of inappropriate conduct – he had smoked a hookah pipe with other ITT employees in the campus parking lot, had referred to his colleagues as the "Mafia" and schemed a plan to close all of the campus restrooms so as to force employees to go to a nearby Arby's fast-food restaurant.

4. ITT terminated Halasa's employment. Halasa filed suit, claiming that he was terminated because he had identified and reported violations of ITT's legal obligations under the Program Participation Agreement ("PPA"). The district court granted ITT's motion for summary judgment and the Seventh Circuit affirmed.

5. The Seventh Circuit held that Halasa's statutory claim must fail because he cannot show ITT fired him "because of" his protected activity available

under the False Claims Act's anti-retaliation clause. Specifically, Halasa could not show that the decisionmakers – those who decided to terminate him – knew of his protected conduct. Halasa's reports regarding potential violation of the PPA were not presented to the decisionmakers and there is no indication that this information was passed on to the decisionmakers.

E. A company's disclosure to prospective employers of a former contract worker's history of migraine headaches did not violate the ADA's medical record confidentiality requirements because the company did not learn about the worker's migraine condition through a medical inquiry. EEOC v. Thrivent Fin. for Lutherans, 700 F.3d 1044 (7th Cir. 2012).

1. Omni Resources, Inc., a technology consulting company, hired Gary Messier to work as a temporary computer programmer for Thrivent. On November 1, 2006, Messier failed to report for work. His supervisor at Thrivent contacted Omni, who, in turn sent Messier an email asking for clarification on his whereabouts. Hours later, Messier sent an email response to his Omni and Thrivent supervisors stating that he had "been in bed all day with a severe migraine" and that when he gets migraines of such severity he is "bed ridden." Messier quit his job at Thrivent a month later.

2. Messier had difficulty finding alternative employment, noting that three prospective employers lost interest in him after conducting reference checks. He began to suspect that Thrivent was saying negative things to prospective employers about him during reference checks. Messier hired an online reference checking agency to find out what his former Thrivent supervisor was saying about him. During the phone call, Messier's former supervisor said that Messier "had medical conditions where he gets migraines. I had no issue with that. But he would not call us. It was the letting us know."

3. Based upon that information, Messier filed a charge with the EEOC alleging disability discrimination under the ADA. The EEOC first issued a "Letter of Discrimination" to Thrivent stating that it had found reasonable cause to believe that Thrivent had violated the ADA. When the EEOC's communication did not lead to settlement, the EEOC filed suit, alleging that Thrivent had violated the ADA's confidentiality provisions regarding confidential medical information.

4. The district court granted summary judgment for Thrivent. The EEOC appealed to the Seventh Circuit, arguing that the supervisor's email inquiry about Messier's unexpected absence, which prompted his migraine disclosure, was an employer inquiry subject to the ADA's confidentiality requirements. Thus, the EEOC argued, the relaying of that information to callers checking Messier's employment references violated the ADA.

5. The Seventh Circuit held that only "medical inquiries" are covered, not all "job-related" inquires as suggested by the EEOC. In this particular case, the supervisor's email was not a medical inquiry given that Messier's absence was

as likely to have been due to a nonmedical condition. The medical information obtained in the email did not need to be treated as confidential.

F. The Seventh Circuit reinstates a $3.8 million punitive damages verdict in a Cuban Jewish pipefitter's Title VII hostile work environment claim. May v. Chrysler Grp., 692 F.3d 734 (7th Cir. 2012).

1. Otto May was a pipefitter, employed by Chrysler at its Belvedere, Illinois assembly plant. More than 50 times, between 2002 and 2005, May was the target of racist, homophobic and xenophobic remarks and anti-Semitic graffiti that appeared in and around the plant's paint department. May also had had bike and car tires punctured, sugar put in his vehicle's gas tank and found a dead bird at his workstation that was wrapped in toilet paper (complete with a pointy hat) to resemble a Ku Klux Klan member.

2. When the incidents first started in 2002, May reported the incidents to the local police and Chrysler. May complained to his supervisors and Human Resources was notified. Chrysler's head of Human Resources and its head of union relations held two meetings with about 60 of the skilled trades employees. May felt that this was not enough. The harassment continued. May eventually contacted the police and the Anti-Defamation League, stating that he genuinely feared for his life. May's complaints eventually reached Chrysler's corporate diversity office. A staff adviser interviewed May and demanded that he provide the names of the individuals who he thought were responsible for the ongoing harassment. May reluctantly provided names. Once the staff adviser obtained May's list, he did not interview any of the individuals nor was HR instructed to interview any of the individuals. Rather, the list was used to compile a database of people who had access to May's workstations. Interestingly, an HR employee whose husband's name was on the list was assigned the task of developing this database of names.

3. May filed suit in 2002 (early in the cycle of harassment). While he alleged a variety of Title VII and Section 1981 claims, his hostile work environment claim was the only one to survive summary judgment.

4. The graffiti and death threats continued. A forensic document examiner was retained whose report (which was issued in 2007) said the evidence was inconclusive as to the identity of the harasser.

5. After a seven-day trial, the jury awarded May $709,000 in compensatory damages and $3.5 million in punitive damages. After the verdict, and concluding that Chrysler's conduct did not rise to the level necessary to justify a punitive damages award, the trial court reduced his compensatory damages to $300,000 and took away the punitive damages. Both parties appealed – May appealed for the decision to take away his punitive damages and Chrysler appealed that it was even liable.

6. The Seventh Circuit first addressed Chrysler's claim that it had "promptly and adequately respond[ed] to" May's complaints of harassment by reflecting on the death threats and graffiti notes. The tenor of the threats increased. "During the first year of threats – what had Chrysler done? They had a meeting. They interviewed May. And, one year in, they hired [a forensic evidence specialist]." Chrysler did not interview anyone identified on Mays' list. Second, it did not install a single surveillance camera (a request by May and the local police) because "[t]he plant is too massive."

7. The Seventh Circuit also reflected on its role in this appeal, noting that, while it does not "sit as a super-personnel department," deciding this appeal required an "assess[ment of] the response of the actual personnel department." Furthermore, "[t]he evidence easily supports the jury's decision that Chrysler did not" take "actions reasonably calculated to end the harassment."

8. As for the punitive damages, the court characterized Chrysler's response to the repeated reports of harassment as "shockingly thin as measured against the gravity of May's harassment." The court was pointedly critical of Chrysler's wait and see approach. "At some point the response sinks from negligent to reckless, at some point it is obvious that an increased effort is necessary, and if that does not happen, punitive damages become a possibility." Here, only during the first year of the harassment did Chrysler put forth effort to address the conduct. The harassment continued. May was subjected to harassment for more than three years.

G. The Seventh Circuit Court of Appeals holds that neither the FMLA nor the ADA creates an obligation for an employer to provide light duty work to an individual who is unable – with or without accommodation – to return to the essential functions of his job. James v. Hyatt Regency Chicago, 707 F.3d 775 (7th Cir. 2013).

1. James, who had been an employee of Hyatt Regency Chicago as a banquet steward for more than 20 years, took a leave of absence in April 2007 to deal with an eye injury that occurred outside the scope of his employment. On his employment application, James stated that he had a vision problem that is correctable with eyeglasses and magnifying glasses. Hyatt was aware of his nearsightedness and accommodated him by increasing the print size of his work assignments and schedules. His position required him to lift pots and pans and transport garbage cans around the facility's banquet and food-service area.

2. In March 2007, James was punched in the eye during an altercation that took place outside of work, leading to a retinal detachment in his left eye. He underwent surgery the following month. Hyatt provided James with FMLA information. On April 24, 2007, his physician stated that James could return to "light duty" the next month, but did not identify any specific restrictions or timeline for the light duty assignment. James submitted his FMLA request and accessed his twelve weeks of FMLA leave. He later submitted a note

from a doctor who stated that he could return to work with lifting and bending restrictions, which impacted his ability to perform the tasks of his steward position. The Hyatt diligently attempted to obtain additional information regarding James' work restrictions. Subsequent communication with his physician noted that James could return to work, but could not complete any task that required better than 20/200 vision. After receiving this physician's information, Hyatt scheduled a meeting with James to discuss his return.

3. Nearly a year from the date of his initial surgery, James returned to work in his same position, shift, and seniority level as he had before his leave of absence. In 2009, James filed suit against Hyatt, alleging claims of retaliation and interference with his rights under the FMLA and discrimination and retaliation under the ADA by failing to allow him to return to light duty back in April of 2007.

4. The district court granted summary judgment in Hyatt's favor on both claims. On appeal, the Seventh Circuit upheld the lower court's decision.

5. As to James' FMLA interference claim, the Seventh Circuit disagreed with James' argument that the Hyatt violated the FMLA back in April 2007 when it did not promptly reinstate him to his position upon presentation of his "light duty" doctor's note. Specifically, the Court noted: (1) the physician's note did not "release" James until May 10, 2007; and (2) the note did not specify when James' "light duty" restriction would be lifted. The Court reaffirmed its previous holdings that "[t]here is no such thing as 'FMLA light duty.'"

6. As to James' ADA failure to accommodate claim, the Court noted that Hyatt had, indeed, been accommodating James' visual impairment throughout the course of his 20+ years of service. James' submission of medical documentation representing he was incapable of working was what, ultimately, kept him from returning to work. The "conditional" and sometimes contradictory releases provided by James' physicians did not provide the "true state of James' medical condition until Hyatt proactively reached out to James' physician in January 2008 for clarification."

V. NLRB CASE LAW DEVELOPMENTS

A. The U.S. Court of Appeals for the District of Columbia Circuit invalidated President Obama's recess appointments of three members (Sharon Block, Terence Flynn, and Richard Griffin) to the NLRB and, thus, the Board lacks a valid quorum to support an unfair labor practice order against a bottling firm. Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

1. On January 4, 2012, President Obama made three recess appointments to the NLRB. On February 28, 2012, a three-member panel of the Board, comprised of Members Hayes, Flynn (new appointment) and Block held that

Noel Canning, a bottler and distributor of Pepsi-Cola products, violated the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement. Noel Canning appealed to the D.C. Circuit Court of Appeals.

2. In its appeal, Noel Canning argued that President Obama's appointment power (described in the U.S. Constitution) did not apply to the NLRB appointments because: (a) the Senate was not in "the Recess" at the time of the appointments; and (b) the vacancies being filled did not "happen during the Recess" of the Senate.

3. The "Recess Appointments Clause" in the U.S. Constitution states: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Noel Canning argued that Senate was not "in Recess" between sessions at the time the President made the appointments.

4. The D.C. Circuit held that the President's appointments exceeded his constitutional authority because he is only permitted to fill a vacancy "that may happen during the Recess." On January 4, 2012, when President Obama made the recess appointments, the Senate was not in intersession recess because it never adjourned the First Session of the 112th Congress.

5. The Court vacated the NLRB's Noel Canning Order.

B. The NLRB concludes that prohibiting employees from discussing ongoing investigations may violate the National Labor Relations Act ("NLRA"). Banner Health Sys. d/b/a Banner Estrella Med. Ctr., 358 NLRB No. 93 (July 30, 2012).

1. An employee at the Phoenix-based medical center raised a workplace safety issue with his supervisor, who disagreed about the safety concern. The human resources department became involved and the employee received coaching (warning). Shortly thereafter, the employee received his yearly performance evaluation in which his supervisor rated him as not fully meeting behavior expectations. The employee complained to the human resources department and was told not to discuss the matter with co-workers while the matter was being investigated. Ultimately, the evaluation was revised to the employee's benefit.

2. The employee then filed a complaint with the NLRB's Phoenix office alleging that his employer violated Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to interfere with an employee's rights protected under Section 7.

3. An ALJ initially ruled on the complaint in the employer's favor. During the hearing, it became known that the employer had all of its employees complete a confidentiality agreement that prohibited them from discussing

such issues as salaries and discipline. The ALJ ruled that this confidentiality agreement violated the NLRA.

4. The employer appealed the ALJ's ruling to the NLRB, and the NLRB's general counsel cross-filed on the employee's behalf.

5. The Board adopted the ALJ's ruling that the evaluation was not unlawful, but the confidentiality agreement was unlawful. The NLRB then modified the ALJ's decision and ruled that the employer's prohibition on employees discussing internal investigations violated the NLRA, reasoning that the employer's concern about protecting investigation integrity did not outweigh an employee's right to engage in protected, concerted activity.

6. In short, the NLRB concluded that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct.

7. Such a rule, according to the Board, violates the NLRA, which protects employees' rights to engage in "concerted activities" for their mutual aid and protection, regardless of whether the employees belong to a union.

C. The NLRB abandons its 50-year old rule in Bethlehem Steel and holds that an employer's obligation to check off union dues continues after the expiration of a union contract establishing such an arrangement. WKYC-TV Inc., 359 NLRB No. 30 (Dec. 12, 2012).

1. Television station WKYC terminated the union check-off provisions in October 2010 after its labor contract with the union expired.

2. The union brought an unfair labor practice charge and a hearing was held before an ALJ who found that the television station was free to unilaterally discontinue honoring the dues check-off provision when the contract expired.

3. The NLRB acting general counsel and the union filed exceptions to this decision, urging the full board to reverse this long-standing precedent.

4. Chairman Mark Gaston Pierce and members Richard F. Griffon, Jr. and Sharon Block stated that Bethlehem Steel and decisions which follow it "should be overruled to the extent they stand for the proposition that dues check-off does not survive contract expiration under the *status quo* doctrine."

5. The majority opined that "requiring employers to honor dues check-off arrangements post-contract expiration is consistent with the language of the [National Labor Relations] Act, its relevant legislative history, and the general rule against unilateral changes to terms and conditions of employment."

6. Board member Brian Hayes dissented, arguing that the Board majority failed to point to any evidence that the long standing Bethlehem Steel precedent,

allowing dues check off to be terminated after the contract expires, "has impeded collective bargaining or the peaceful resolution of labor disputes." Hayes wrote "it hardly advances collective bargaining to require that some portions of negotiated agreements – *i.e.,* those favorable to the union – survive contract expiration, while others – those favorable to the employer – do not."

D. Facebook-related terminations reversed by the NLRB and employees ordered to be reinstated. Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (Dec. 14, 2012).

1. The case started as a dispute between two co-workers who were employed by the Respondent to assist victims of domestic violence. One employee, Lydia Cruz-Moore, often criticized other employees, including Marianna Cole-Rivera. The criticism escalated on a non-workday (Saturday), when Cole-Rivera received a text message from Cruz-Moore stating that she intended to discuss concerns regarding employee performance with the Executive Director. Cole-Rivera responded via text message, questioning whether she really wanted the Executive Director to be involved. From her home computer, Cole-Rivera posted a message on her Facebook page stating:

   "Lydiz Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?"

2. Four off-duty employees responded to Cole-Rivera's message by posting responsive comments from their home computers on Cole-Rivera's Facebook page. Cruz-Moore also posted a response on Facebook. She then complained to the Executive Director and at his request printed the Facebook pages for his review.

3. The Executive Director discharged Cole-Rivera and the four coworkers for posting comments that were "bullying and harassment" of a coworker and for violating the Company's "zero tolerance" policy prohibiting such conduct.

4. The majority of the Board concluded that the employer's decision to terminate the five employees violated the NLRA because the activity was concerted for the "purpose of mutual aid or protection." The Board inferred, from the circumstances surrounding the posts, that the online activity was a first step that the employees were taking toward defending Cruz-Moore's complaints and the suggested threat that Cruz-Moore was going to discuss employee performance with the Executive Director.

5. Board Member Hayes dissented, arguing that not all shop talk among employees is concerted within the meaning of the NLRA. Furthermore, the evidence was void of "evidence of a nexus to group action" and, as such, was mere griping that is not protected by the NLRA.

6. The Board adopted the recommended Order of the ALJ which, in part, ordered the immediate reinstatement of all five employees.

E. While an assistant manager's Facebook posting urging others to text a pro-union employee constituted harassment, other disparaging comments that were made were protected under the NLRA. Miklin Enters., Inc. d/b/a Jimmy John's, No. 18-CA-19707, 2012 WL 1387939 (NLRB Apr. 20, 2012).

1. During a union organizing push at a Jimmy John's franchise owned by Miklin Enterprises, a rank and file employee established the Jimmy John's Anti-Union Facebook page. This page was not "private"; rather, it was open and accessible to anyone who had a Facebook account. Members of the Anti-Union Facebook group included rank and file employees, a number of store managers, assistant managers, area managers, and the co-owner.

2. During the union campaign, the co-owner posted a notice that he had received a text message regarding the Union's intention to put up a "working sick" poster. The co-owner encouraged members of the Anti-Union Facebook page to take the posters down.

3. During the union campaign, an assistant manager posted a pro-union employee's phone number on the open Facebook page and suggested that others text that employee to "let him know how they feel." The assistant manager also posted messages and responded to other negative postings about the pro-union employees.

4. Six of the union supporters (Jimmy John's employees), were terminated for engaging in a public campaign complaining of the company's employee sick leave policy.

5. The ALJ ruled that the posting of the sick day posters at and outside the Jimmy John's stores was activity protected by Section 7 of the NLRA. Citing other Board decisions, the ALJ noted that "virtually any form of protected activity can be subjectively considered disloyal, including forming, joining or assisting a labor organization." Moreover, "protected activity will often adversely impact an employer's reputation and revenue."

6. The ALJ also ruled that the co-manager violated Section 8(a)(1) of the NLRA when he encouraged others to remove the union posters.

7. While the ALJ ruled that the Facebook postings did not violate Section 8(a)(1), he did rule that the assistant manager's Facebook postings about the pro-union employee did violate the Act. Because she "encourage[ed] employees and managers to text [the pro-union employee] without any specification of what they should communicate to [him], [she] was encouraging other employees and managers to harass [him] for activities that were protected, as well as some that were arguably unprotected."

VI. OTHER INTERESTING COURT CASES.

A. A Pennsylvania federal judge ruled that the ADA does not prohibit U.S. Steel from administering random alcohol screenings on probationary employees who work in safety-sensitive positions. EEOC v. U.S. Steel Corp., 10-1284, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013).

1. In September 2010, the EEOC filed a lawsuit against U.S. Steel, alleging that the company had violated the ADA when it required Abigail DeSimone, a probationary employee working at the coke plant in Clairton, Pennsylvania, to undergo a breathalyzer test to detect alcohol. Her test was positive for alcohol. DeSimone told the company nurse that she had not ingested any alcohol in the past month and that the positive result may have been related to her diabetes. When the nurse refused DeSimone's request for a blood alcohol test, she sought, on the same day, a blood alcohol test from her medical provider. The blood alcohol test was negative. U.S. Steel refused to accept the result of the blood alcohol test and terminated DeSimone. U.S. Steel had been conducting the random drug and alcohol tests of its probationary employees since 2006 in accordance with its collective bargaining agreement with the United Steelworkers Union.

2. DeSimone settled privately with U.S. Steel in March 2012. The EEOC continues to pursue its claims against U.S. Steel's practices.

3. The EEOC alleged that U.S. Steel's alcohol testing is a medical examination under the ADA and, therefore, must be "job related" and "consistent with business necessity" as required under the ADA. The EEOC's allegation was that there has to be reasonable belief that an employee is unable to perform his or her job duties or poses a direct threat to himself or others due to a medical condition.

4. The court agreed with U.S. Steel, acknowledging that "there is no question that maintaining workplace safety is a legitimate and vital business necessity."

5. It is anticipated that the EEOC will appeal this decision.

B. A district court in Ohio holds that an employee's veganism may meet the requirement of a religious belief for purposes of Title VII's anti-discrimination provision. Chenzira v. Cincinnati Children's Hosp. Med. Ctr., No. 11-917, 2012 WL 6721098 (S.D. Ohio, Dec. 27, 2012).

1. Chenzira, who had been employed by the Cincinnati Children's Hospital Medical Center ("Hospital") for more than a decade as a Customer Service Representative, was discharged in December 2010 for refusing to be vaccinated for the flu, a Hospital policy.

2. Chenzira filed suit alleging that the discharge violated her religious and philosophical convictions because she is a vegan. The Hospital moved to

dismiss the complaint on the grounds that veganism is not a true religion, but, instead is more of a dietary reference or social philosophy.

3. Chenzira cited EEOC's guidelines on discrimination because of religion[1], arguing that her veganism is a practice that "constitutes a moral and ethical belief which is sincerely held with the strength of traditional religious views." The court denied the Hospital's motion.

4. The court did not find that veganism is or is not a religion. Rather it noted it is "plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views." Furthermore, there simply is no evidence before the Court regarding what, if any, contact Plaintiff might have with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment."

C. An employee's posting of photos while on vacation in Mexico provide an employer the evidence needed to justify termination for dishonest abuse of FMLA leave. Lineberry v. Richards and Detroit Med. Ctr., No. 11-13752, 2013 WL 438689 (E.D. Mich. Feb. 5, 2013).

1. Carol Lineberry was hired by Detroit Medical Center ("DMC") in 2009 as a Student Nurse Associate. She was promoted to Registered Nurse in September and was performing the tasks of her job satisfactorily. In January 2011 she experienced lower back and leg pain after a day of moving stretchers while at work. She was ordered by her physician that she should not return to work and was approved for FMLA leave through April. She also received short-term disability benefits during that time.

2. During a one-week period of her FMLA leave, Lineberry took a pre-planned trip to Mexico. Her physician approved the trip and also provided an affidavit that partaking on the trip would not be as physically demanding as performing the duties of her job.

3. Lineberry posted updates and photos about her vacation on her Facebook account. Her co-workers saw photos of Lineberry riding in a motorboat, lying on her side on a bed holding up bottles of beer, and pictures of her holding her infant grandchildren who weighed more than 15 pounds as she stood. The co-workers complained to her supervisors.

4. After returning from vacation, Lineberry sent her supervisor an email, complaining that no one had sent her a "get well" card. Her supervisor engaged in an email exchange, telling Lineberry that they found out about her trip to Mexico and that they expected she would be well enough to come back to work. Lineberry responded that she used a wheelchair while in Mexico and could not stand for very long periods of time. Shortly thereafter, Lineberry was released to return to work, with restrictions.

[1] *See* EEOC Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72,612 (Oct. 31, 1980), codified at 29 CFR § 1605.1.

5. The supervisor alerted the Loss Time Management Department about her belief that Lineberry had been misusing her leave. During an investigative meeting with Lineberry, she reiterated her claim that she had to use wheelchairs in all airports on her trip. After being shown copies of her Facebook photos, Lineberry admitted that she had lied about needing to use a wheelchair. DMC concluded its investigation and recommended that Lineberry be terminated. The VP of Human Resources ultimately approved the termination.

6. Lineberry filed suit alleging that DMC violated FMLA by interfering and denying her right to be reinstated to her staff nurse position and for retaliating against her for taking FMLA leave. DMC's motion for summary judgment was granted.

7. The court reasoned that, because of Lineberry's "undisputed dishonesty," DMC had the "right to terminate Plaintiff – without regard to her leave status because the FMLA does not afford an employee greater rights than she would have if she was not on FMLA leave." Furthermore, the court observed, based upon Lineberry's Facebook postings, her lies about the use of a wheelchair and her subsequent admission during the investigation meeting, DMC "honestly believed" that there was "evidence and particularized facts" that could reasonably support their termination decision.

APPENDIX A
EEOC CHARGE STATISTICS
FY 2001 – FY 2012

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Total Charges	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922	99,947	99,412
	28,912	29,910	28,526	27,696	26,740	27,238	30,510	33,937	33,579	35,890	35,395	33,512
Race	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%	37.0%	35.6%	36.0%	35.9%	35.4%	33.7%
	25,140	25,536	24,362	24,249	23,094	23,247	24,826	28,372	28,028	29,029	28,534	30,356
Sex	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%	30.1%	29.7%	30.0%	29.1%	28.5%	30.5%
	8,025	9,046	8,450	8,361	8,035	8,327	9,396	10,601	11,134	11,304	11,833	10,883
National Origin	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%	11.4%	11.1%	11.9%	11.3%	11.8%	10.9%
	2,127	2,572	2,532	2,466	2,340	2,541	2,880	3,273	3,386	3,790	4,151	3,811
Religion	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%	3.5%	3.4%	3.6%	3.8%	4.2%	3.8%
	1,135	1,381	1,550	930	1,069	1,241	1,735	2,698	2,943	2,780	2,832	2,662
Color	1.4%	1.6%	1.9%	1.2%	1.4%	1.6%	2.1%	2.8%	3.2%	2.8%	2.8%	2.7%
	22,257	22,768	22,690	22,740	22,278	22,555	26,663	32,690	33,613	36,258	37,334	37,836
Retaliation - All Statutes	27.5%	27.0%	27.9%	28.6%	29.5%	29.8%	32.3%	34.3%	36.0%	36.3%	37.4%	38.1%
	20,407	20,814	20,615	20,240	19,429	19,560	23,371	28,698	28,948	30,948	31,429	31,208
Retaliation - Title VII only	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%	28.3%	30.1%	31.0%	31.0%	31.4%	31.4%
	17,405	19,921	19,124	17,837	16,585	16,548	19,103	24,582	22,778	23,264	23,465	22,857
Age	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%	23.2%	25.8%	24.4%	23.3%	23.5%	23.0%

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
	16,470	15,964	15,377	15,376	14,893	15,575	17,734	19,453	21,451	25,165	25,742	26,379
Disability	20.4%	18.9%	18.9%	19.4%	19.7%	20.6%	21.4%	20.4%	23.0%	25.2%	25.8%	26.5%
	1,251	1,256	1,167	1,011	970	861	818	954	942	1,044	919	1,082
Equal Pay Act	1.5%	1.5%	1.4%	1.3%	1.3%	1.1%	1.0%	1.0%	1.0%	1.0%	0.9%	1.1%
										201	245	280
GINA										0.2%	0.2%	0.3%

NOTE: The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the individual types of discrimination listed.

APPENDIX B
EEOC STATISTICS
STATUTES BY ISSUE – FY 2010 – FY 2012

	FY2010					FY2011					FY2012				
	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA
Advertising	9	32	1	0	0	14	70	0	0	0	11	43	3	0	0
Apprentice-ship	23	15	8	0	0	23	9	10	0	0	17	6	1	0	0
Assignment	3,896	1,281	1,001	46	0	3,970	1,328	1,738	31	7	3,718	1,209	1,676	30	10
Benefits	884	394	334	46	6	778	862	508	26	9	759	824	546	45	1
Benefits Insurance	185	248	233	1	4	164	150	320	4	9	135	118	344	6	7
Benefits Retirement/ Pension	66	358	132	1	0	81	850	80	6	1	56	213	85	6	0
Breach of Confidentiality	0	0	240	0	7	0	0	321	0	8	0	0	336	0	10
Constructive Discharge	4,278	1,136	1,039	36	9	4,397	1,101	1,551	50	6	4,267	1,153	1,587	39	11
Demotion	2,370	1,005	619	24	4	2,118	911	932	15	3	2,049	968	980	25	6
Discharge	38,715	14,885	14,494	216	78	38,115	14,759	21,988	176	120	36,408	14,701	23,098	217	147
Discipline	11,381	3,660	3,039	46	11	10,416	3,330	4,611	46	30	10,117	3,453	4,985	47	25
Early Retirement Incentive	8	37	3	0	0	5	34	13	0	0	6	17	7		0

	FY2010					FY2011					FY2012				
	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA
English Language Only Rule	227	0	0	0	0	205	0	0	0	0	199	0	0	0	0
Exclusion	625	200	141	16	1	550	149	200	6	3	493	137	189	8	3
Filing EEO Forms	728	0	0	2	0	621	0	0	5	0	652	0	0	5	0
Harassment	17,736	4,777	4,119	90	22	17,698	4,639	6,834	50	50	17,173	4,908	7,180	69	42
Hiring	3,576	2,191	1,386	8	32	3,843	2,600	2,207	7	41	4,084	2,731	2,187	17	43
Intimidation	3,078	746	670	17	9	2,825	646	1,020	19	8	2,814	693	1,096	13	10
Job Classification	303	111	75	7	1	260	87	109	7	0	266	102	135	14	0
Layoff	1,951	1,522	665	22	3	1,531	1,016	738	9	3	1,389	1,054	764	8	1
Maternity	348	0	22	0	0	303	0	28	0	0	223	0	22	0	0
Other	2,178	613	681	24	8	2,123	661	1,065	26	22	1,878	585	1,048	28	32
Other Language/ Accent Issue	262	0	0	0	0	292	0	0	0	0	221	0	0	0	0
Paternity	12	0	0	0	0	17	0	0	0	0	9	0	0	0	0
Posting Notices	56	9	5	0	0	26	15	14	0	1	57	21	18	3	4
Prohibited Medical Inquiry/Exam	0	0	310	0	28	0	0	343	0	28	0	0	401	0	50
Promotion	4,390	1,576	546	57	3	4,744	1,654	935	62	10	5,923	1,798	963	73	3

	FY2010					FY2011					FY2012				
	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA
Qualifications	190	89	37	4	0	168	78	83	2	0	138	82	65	3	1
Reasonable Accommo-dation	1,214	0	8,400	0	13	1,144	0	12,426	0	18	1,212	0	13,263	0	18
Recall	246	187	104	2	0	147	104	105	0	0	151	114	104	0	0
Recordkeeping Violation	34	0	1	0	1	24	4	51	0	5	24	7	24	0	1
References Unfavorable	351	83	104	3	0	290	58	100	2	1	255	61	127	1	1
Referral	68	21	22	0	0	73	20	25	0	0	83	33	34	0	0
Reinstatement	258	118	334	0	0	225	109	354	0	2	256	136	364	8	2
Retirement-Involuntary	48	168	72	0	0	67	164	97	0	0	55	144	103	0	0
Segregated Facilities	53	0	1	1	0	52	0	2	0	0	94	0	24	2	0
Segregated Locals	5	0	0	0	0	12	0	0	0	0	10	0	3	0	0
Seniority	215	147	44	6	0	190	152	51	5	0	167	102	54	5	1
Severance Pay Denied	63	60	29	2	1	59	57	28	6	0	55	46	19	5	0
Sexual Harassment	7,944	0	0	33	1	7,809	0	0	27	6	7,571	0	0	17	4
Suspension	3,730	918	916	9	10	3,500	888	1,465	6	14	3,632	984	1,537	8	4
Tenure	84	49	14	2	1	90	50	32	3	0	81	24	17	1	0

	FY2010					FY2011					FY2012				
	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA	TVII	ADEA	ADA	EPA	GINA
Terms/ Conditions	19,603	6,348	4,800	213	32	19,000	5,853	7,466	177	54	18,686	6,211	8,126	172	74
Testing	139	86	53	0	7	117	43	74	1	2	126	45	73	3	5
Training	933	371	184	8	0	877	372	277	4	0	849	330	323	10	2
Union Representation	375	140	142	3	0	356	162	177	2	4	333	140	180	1	2
Wages	4,842	1,355	600	1,000	3	4,717	1,246	900	873	6	6,240	1,208	961	1,046	9
Waivers	3	15	4	0	0	4	34	7	1	0	6	11	5	0	0

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24th Annual Labor & Employment Law Update
Spring 2013

Union and Non-Union:
Preparing Your Company for Today's Activist NLRB

Introduction

- The NLRB has traditionally been viewed as the federal agency that deals with unions and union activity.
- The NLRA has, however, always had a component (protected, concerted activity) that applies to both union *and* non-union workforces.
- The current NLRB has aggressively sought application of the protected, concerted activity concept to non-union workforces.
- This presentation focuses on the NLRB's activist stance toward these non-union workforces.

Goals

- Outline legal framework of NLRB's authority.
- Summarize recent significant decisions and rulemaking initiatives of the NLRB.
- Provide guidance to union *and* non-union employers about what to expect from the NLRB over the next 3+ years.

The National Labor Relations Act (NLRA)

The NLRA

- Signed into law in 1935 by FDR.
- Section 7 describes range of protected employee activities.
- Section 8 safeguards employees' right to engage in those activities, making it unlawful to interfere with those rights.

The NLRA

- Among other things, Section 7 protects employee rights to "*engage in other concerted activities* for the purpose of collective bargaining or *other mutual aid and protection*."

- An unfair labor practice (ULP) can be found by the NLRB for interference with rights protected under the NLRA.

The NLRB

- Five members appointed by the President.
- Cannot issue decisions or take action without a quorum.
- The NLRB's current status has been called into question by the Noel Canning case.
  - Found presidential recess appointments to be invalid, leaving the NLRB without a quorum.
- What now?
  - 200+ decisions hang in the balance.
  - NLRB continues to conduct business.

Practical Effect

- Determinations made by the NLRB since January 2012 may be challenged before the D.C. Circuit as invalid.
- If you are currently in proceedings before the NLRB, preserve the argument that the NLRB is operating without a quorum.
- Continue to pay attention to NLRB decisions.

Protected, Concerted Activity (Section 7 Rights)

Three-Part Analysis

- Is the activity “concerted”?
  - Generally, two or more employees acting together regarding their wages or working conditions.
    - Note single-employee caveat.
- Does the activity seek to benefit others?
  - Compare with a “personal gripe.”
- Is the activity carried out in a way that causes it to lose protection?
  - Reckless, malicious, unlawful.

Examples

- Crowne Plaza LaGuardia.
  - Hotel employees protesting reduced work hours.
- WorldMark by Wyndham.
  - Sales employee complaint regarding dress code changes.
- Parexel International, LLC.
  - Employee complains of low wages because she was not of South African descent.
  - Preemptive strike case.

“Chilling” Section 7 Rights

- Employment policies which “chill” Section 7 rights violate the NLRA, even if no enforcement of the policy has occurred.

- A policy is unlawful if:
  - Employees would reasonably construe it to prohibit Section 7 activity;
  - It was issued in response to union activity; or
  - It has been applied to restrict Section 7 rights.

The NLRB and Social Media

Activity and Policies

- With regard to social media, the NLRB has been the most active federal agency.
- Its focus has largely been twofold: (1) adverse employment action based on employee social media activity and (2) employer social media policies.
- Three reports from the Acting General Counsel on employee social media use and policies.
- Cases beginning to come from ALJs and the NLRB.

Adverse Employment Action

- The NLRB has found online comments about the employment relationship to constitute protected, concerted activity.
- Adverse employment action taken as a result of such online comments has been found to be a ULP.
- Example cases.
  - Karl Knauz Motors, Inc. – First NLRB decision.
  - Hispanics United of Buffalo, Inc.
  - Triple Play Sports Bar.

Social Media Policies

- Costco Wholesale Corp. – Posts that "damage the Company," "defame any individual," or "defame any individual or damage any person's reputation."

- EchoStar Techs, LLC.

- General Motors, LLC.

The NLRB and Confidentiality Mandates

Confidentiality Mandates

- The NLRB has begun to actively scrutinize confidentiality mandates, policies and procedures utilized by employers under the "chilling effect" paradigm of the protected, concerted activity right.
- NLRB v. Northeastern land Services, Ltd. – Confidentiality agreement with employee.
- Taylor Made Transp. Serv. Inc. – Policies prohibiting disclosure of pay rates and compensation data.

Confidentiality Mandates

- Quicken Loans, Inc. – Confidentiality and non-disparagement provisions of employment agreement.

- Banner Estrella Med. Ctr. – Confidentiality mandate during workplace investigation.

The NLRB and At-Will Handbook Disclaimers

At-Will Policy Language

- Recent decisions from NLRB ALJs have suggested that certain at-will employment language in employment policies may violate the concept of protected, concerted activity.
- American Red Cross Arizona Blood Services Region. – At-will relationship could not be altered.
- Hyatt Hotels Corp. – Alteration language.
- Acting General Counsel issues advice memorandum.

What's Next for the NLRB?

Predictions

- Continued protection of Section 7 rights.
- Cases likely to be overturned:
  - Register Guard. – Union use of employer email system.
  - IBM Corp. – Right to co-worker representation during investigatory interviews.
  - BE&K Construction Co. – Lawsuits against unions could create NLRA liability for employers.
  - HS Care, LLC. – Temporary employees in bargaining unit.

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24TH ANNUAL LABOR & EMPLOYMENT LAW UPDATE
SPRING 2013

UNION AND NON-UNION: PREPARING YOUR COMPANY FOR TODAY'S ACTIVIST NATIONAL LABOR RELATIONS BOARD

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GODFREY & KAHN S.C.

UNION AND NON-UNION: PREPARING YOUR COMPANY FOR TODAY'S ACTIVIST NATIONAL LABOR RELATIONS BOARD

Recently, the National Labor Relations Board ("Board"), the judicial body charged with resolving disputes under the National Labor Relations Act ("NLRA"), has issued numerous rulings, applicable to both union and non-union employers. During previous administrations, the Board has focused on unionized work environments; however, the Board under the current Obama administration has issued opinions and rulemaking initiatives that regulate the employment policies and management decisions of non-union private sector employers. To complicate matters further, the authority of the Board to issue many of the recent controversial decisions has been called into question by a recent court decision invalidating the appointment of a number of Board members.

This presentation will outline the legal framework for the Board's authority, summarize recent significant decisions and rulemaking initiatives issued by the Board and, finally, provide guidance on what employers can anticipate from the Board over the next three-and-a-half years.

I. THE NATIONAL LABOR RELATIONS ACT.

The NLRA, passed by Congress and signed into law in 1935 by President Franklin Roosevelt, was meant to encourage the process of unionization and protect employee rights. Section 7 of the NLRA describes the broad range of employee activities protected by the NLRA, while Section 8 safeguards an employee's right to engage in those activities, making it unlawful for an employer to interfere with those rights. Section 7 and Section 8 apply to most all workforces.

1. Section 7 of the NLRA provides:

   "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis added).

2. Section 8(a) of the NLRA defines unfair labor practices and provides, among other employee protections, that:

   "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7.]"

3. The Board has adopted minimal jurisdictional standards for private sector employers when applying the NLRA. Generally, any employer engaged in interstate commerce will be subject to the requirements of the NLRA.

The Board is charged with resolving disputes under the NLRA. Recent court rulings have called into question whether decisions issued by the Board between January 4, 2012 and the

present (several of which are summarized below) are invalid due to unconstitutional recess appointments made by President Obama in early 2012.

A. Background on the NLRA.

The Board is composed of five members and cannot issue decisions or take other action in the absence of a valid three-member quorum. On January 3, 2012, Board Member Craig Becker's term expired leaving the Board unable to act with only two members – Chairman Mark Gaston Pearce and Member Brian Hayes. In order to avert an effective shut-down of the Board, on January 4, 2012 President Obama invoked the Recess Appointments Clause of Article II, Section 2 of the Constitution, and appointed Sharon Block, Richard Griffin, and Terence Flynn as new members to fill out the full five-member Board.

On February 8, 2012, a three-member panel of the Board consisting of Members Hayes, Flynn (recess appointee), and Block (recess appointee) issued an order finding that Noel Canning – a Pepsi bottler from Washington State – violated various sections of the NLRA. Noel Canning petitioned the federal court of appeals for the District of Columbia Circuit for review. On appeal, Noel Canning argued that the Board's February 8, 2012, order was invalid and unenforceable because the Board did not have a valid quorum of three members at the time the order was issued. Noel Canning argued that the recess appointments of Members Block, Griffin, and Flynn were unconstitutional. On January 25, 2013, a unanimous panel of the D.C. Circuit concurred.

B. The Noel Canning Decision.

The D.C. Circuit found the recess appointments invalid for two reasons:

1. The President's appointments to the Board were not made during "the Recess" as that term is used in the Recess Appointments Clause of the Constitution. The crux of the recess argument centers on the fact that, during the time of the appointments, the Senate was holding pro-forma sessions every few days. The court found that because pro-forma sessions were occurring, the Senate was not in Recess for purposes of the Appointments Clause.

2. The vacancies filled by the President's "recess appointments" did not "happen" during "the Recess" of the Senate as required under the same constitutional provision. This argument is based on the fact that the vacancies filled by the President's appointments existed prior to the interim recess.

C. What Now?

1. The Noel Canning decision was issued by a three-judge panel of the D.C. Circuit Court of Appeals. A party can seek review of a panel's decision from the full court of appeals. Rather than seeking a review by the full D.C. Circuit Court of Appeals, the NLRB will appeal the panel's decision directly

to the United States Supreme Court. The NLRB's petition for review by the Supreme Court is due April 25, 2013.

2. If the Supreme Court reviews the case and does not overturn it, the 200 or more decisions issued by the Board since the recess appointments will be invalidated, including many controversial decisions discussed in detail, below, and noted in this outline by an *.

3. Notably, if the Supreme Court affirms the D.C. Circuit's finding that vacancies may only be filled if they arise during a "Recess," other prior Board appointments and administrative agency appointments may also be invalidated.

4. While this appeal is pending, the Board has stated that it will continue to conduct business as usual and continue to hear cases and issue decisions. The Board has reasoned that the D.C. Circuit's decision reflects only one circuit's interpretation of the President's recess appointment powers and that the President's actions were, in fact, lawful.

5. In the meantime, President Obama is seeking the re-appointment of the recess appointees. The GOP is expected to block these nominations, but President Obama will likely successfully appoint a full board prior to the end of his second term. At that point, the Board will be able to issue decisions that are untainted by the recess-appointment issue.

D. Enough With the Legal Stuff, What Does This Mean for My Company?

1. If you have received a determination made by the Board since January 2012, you may file a petition for review in the D.C. Circuit and ask the court to invalidate the order based on Noel Canning.

2. If you are currently in proceedings with the Board, work with your counsel to preserve the argument that the Board currently is not operating with a quorum and is unable to render a decision at this time.

3. Do not disregard the recent decisions of the Board. While there is a distinct possibility that many of the Board's recent decisions will be invalidated, the Board has unequivocally stated that it stands by the decisions. This means that once the Board begins operating with a lawful quorum, similar decisions will likely be reached by the Board.

II. PROTECTED, CONCERTED ACTIVITY (SECTION 7 RIGHTS)

Whether or not an employee's actions amount to protected, concerted activity under Section 7 of the NLRA depends on the facts of the case.

A. The Board's Three-Part Analysis. The Board currently utilizes the following three part analysis, as described on its website:

1. Is the Activity Concerted? Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.

2. Does It Seek to Benefit Other Employees? Will the improvements sought – whether in pay, hours, safety, workload, or the terms of employment – benefit more than just the employee taking action? Or is the action more along the lines of personal gripe, which is not protected?

3. Is It Carried Out In A Way That Causes It To Lose Protection? Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause even concerted activity to lose its protection.

B. Recent Cases That Help Explain Protected, Concerted Activity.

1. Crowne Plaza LaGuardia, 357 NLRB No. 95 (Sept. 30, 2011). The Board in this case held that a hotel acted unlawfully when it disciplined 10 workers who participated in a protest in the hotel lobby while in work uniforms.

   During the protest over reduced work hours, 13 employees surrounded the company's COO in a public corridor of the hotel to present him with a petition. When the COO refused to engage in discussions outside his office, the employees began chanting and blocking the COO's return to his office. Three employees touched, grabbed, or pushed the COO before security guards arrived, and one employee had brief physical contact with a security guard during the protest. In response, the hotel suspended all 13 employees who were present at the protest and fired the four employees that had pushed or touched the COO and security guard.

   The Board found that the employees were engaged in protected, concerted activity when they engaged in an impromptu protest in the public corridor of the hotel while in uniform. The Board rejected the company's argument that the employees broke a work rule that required them to refrain from any loud discussions in the public areas of the hotel. The Board cited established precedent that a violation of a work rule does not necessarily deprive employees of Section 7 protections. As it relates to the employees that engaged in physical contact with the COO, the Board found that the behavior of the three employees who pushed the COO was not protected and that the termination of such employees was lawful. The Board found that the termination of the fourth employee who touched the security guard in passing was unlawful because the touching was not deliberate, and the employee's activities were otherwise protected and concerted.

2. WorldMark by Wyndham, 356 NLRB No. 104 (Mar. 2, 2011). The Board in this case held that a sales employee's complaint regarding changes to the dress code was protected, concerted activity.

   The company in this case formerly employed a "resort casual" dress code for sales representatives. Many employees at this particular location wore "Tommy Bahama" style shirts that were customarily not tucked into the employees' pants. When the charging employee learned the company had changed the dress code and would require him to tuck in his shirt, he asked his supervisor if the policy applied company-wide or "just to us?" During this conversation, another employee commented negatively on the new rule. The discussion became heated and several other employees on the sales floor gathered to watch the exchange. The Company issued the charging employee a written warning for arguing with his supervisor on the sales floor.

   The Administrative Law Judge ("ALJ") that initially heard the case found that the charging employee's actions may have been protected to the extent they were regarding the terms and conditions of employment – employee dress. However, the ALJ did not find the employee's statement to be concerted. The ALJ reasoned that the employee was acting in his own self-interest without a common goal. The Board disagreed and found that the employee's reference to the applicability of the policy to "us" rendered the activity concerted. In addition, the fact that others joined in on the conversation also made the employee's actions concerted.

3. Parexel International, LLC, 356 NLRB No. 82 (Jan. 28, 2011). The Board in this case found that the employer acted unlawfully when it terminated an employee who complained that her wages were low because she was not of South African descent.

   The charging employee was party to a conversation with several co-workers who were of South African descent, and, during this conversation, the co-workers untruthfully informed the employee that they made higher wages and received preferential treatment due to their national origin. The employee later confronted her manager regarding what she believed to be unfair wage treatment. The employee was subsequently discharged for spreading "rumors."

   The Board found that the employee's discussion regarding wages was protected because wages are central to the terms and conditions of employment. The Board also found that, despite the fact that the employee never discussed her wage concerns with other co-workers, the employee's actions were concerted because the company's discipline was a "pre-emptive" strike to discourage the employee from continuing to discuss wages.

C. The "Chilling" of Section 7 Rights.

Employee handbook policies and general employment procedures can implicate employees' Section 7 rights. The standard the Board uses in determining whether a specific employment policy or work rule violates the NLRA is "*whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights*." Lafayette Park Hotel, 326 NLRB 824, 825 (1998). Importantly, the Board has found that by simply maintaining a rule, an employer may be in violation of the NLRA – even though the employer has not actually enforced the rule against any employee.

The Board has held that absent an explicit restriction on Section 7 activity, an employment policy or work procedure is unlawful if:

1. Employees would reasonably construe the language of the policy to prohibit Section 7 activity;

2. The rule was promulgated in response to union activity; or

3. The rule has been applied to restrict the exercise of Section 7 rights (*i.e.*, the rule has been used to prohibit the discussion of terms and conditions of employment).

Lutheran Heritage Village-Livonia, 242 NLRB 646, 647 (2004).

Employers are now facing the challenge of trying to determine exactly what type of employment policies may violate the NLRA. The decisions discussed below underscore the difficulty in determining how an employee might "reasonably construe" a particular employment policy.

III. THE BOARD AND SOCIAL MEDIA.

The Board has ruled that employees' social networking activities, including use of websites such as Facebook, Twitter, Instagram, etc., can constitute protected, concerted activity under the NLRA. Likewise, the Board has found that social media policies limiting the content of what an employee can discuss on social networking sites can also violate the NLRA.

A. Disciplining Employees for Social Media Usage.

Employers should proceed with caution when considering discipline of an employee for online postings regarding the workplace or employment generally. Based on the holdings of the following cases, online comments made about the employment relationship have been interpreted by the Board as efforts to improve the terms and conditions of employment. Moreover, just because an employee's post appears to be the complaint of a single individual, it can quickly become "concerted" activity on behalf of multiple employees.

1. Hispanics United of Buffalo, Inc., No. 3-CA-278772 (Sept. 2, 2011). An ALJ ruled that the employer violated the NLRA by terminating five employees for posting critical comments regarding a co-worker on Facebook.

The employees who were discharged were discussing another employee who had often criticized the job performance of others. One of the offended employees initiated a discussion of the criticism online, and several other employees vented in a Facebook thread. In the Facebook discussion, curse words were used and disparaging comments were made regarding the employee. The employee who was the target of the thread complained to the company's executive director, and, after an investigation, the employees who engaged in the online discussion were terminated for violating the Company's harassment policy.

The ALJ found the Facebook discussion analogous to discussions "over the water cooler" that have historically triggered the protections of Section 7. The ALJ found that the posts were protected, concerted activity under the NLRA because discussions regarding criticisms of job performance are protected. In addition, to the same extent seeking changes to wages and working conditions are protected, the ALJ reasoned that maintaining the "status quo" in the workplace is also protected.

2. Design Technology Group, LLC, 20-CA-35511 (April 27, 2012). The ALJ in this case ordered a clothing store to rehire three employees who were terminated after criticizing their supervisor on Facebook.

   The employees in question requested their supervisor to close the store early in light of safety concerns. The supervisor failed to implement the employees' suggestion, and the employees commented on Facebook about the way their manger treated them. One post read, "It's pretty obvious that my manager is as immature as a person can be." Another post referenced the store's namesake "rolling over in her grave." The manager learned of these posts and alerted upper management. Shortly thereafter, two of the employees who commented on Facebook were terminated for insubordination.

   The ALJ determined that the manager's cited reason for termination – insubordination – was pretextual and that the termination was based on the employees engaging in protected, concerted activity. The ALJ found that the Facebook comments were a continuation of the employees' discussion regarding the terms and conditions of employment – hours of operation. The ALJ further found that the activity was concerted because more than one employee was involved. The ALJ found that the clothing store violated the NLRA, because the employees were talking about working conditions, which is activity protected by Section 7.

3. Triple Play Sports Bar, No. 34-CA-12915, JD-01-12 (Jan. 3, 2012). An ALJ held that an employer violated the NLRA after terminating two employees, one who referred to their employer as an "a**hole" on Facebook and another who simply clicked "like" in response to the post.

The employees in question were upset about the company's method of withholding taxes. One employee posted on Facebook complaining about her liability for state taxes. The employee repeatedly used the "F" word when describing her manager and the company. The second employee "liked" the initial posts and several derogatory comments about her supervisor. The supervisor discovered the Facebook thread and terminated the employee for disloyalty.

Because the posts related to complaints regarding the method of withholding taxes, the ALJ found the posts to be protected activity despite the vulgar language. The ALJ reasoned that the conduct did not involve threats, insubordination or physical intimidation and were therefore protected. The ALJ also found that one employee, whose only involvement was clicking the "like" button, participated in the discussion in a way "that was sufficiently meaningful as to rise to the level of concerted activity." The ALJ noted that the Board had never required a certain level of engagement or enthusiasm for activity to rise to the level of protected, concerted activity.

4. Karl Knauz Motors, Inc., 358 NLRB No. 164 (Sept. 28, 2012)*. The Board ruled that the employer did not violate the NLRA by firing an employee over a social media posting because the posting was unconnected to any terms and conditions of employment and did not implicate any concerted action.

Knauz Motors discharged an employee because of certain Facebook posts made by the employee. The first set of posts included "mocking and sarcastic" pictures and comments about a sales event. Apparently, the employee was dissatisfied with the food selection for the event, which included hot dogs and water. The ALJ initially reviewing the case noted that since the food choices could impact the employee's commissions, which were a term and condition of his employment, the pictures and mocking comments constituted "concerted protected activity." The ALJ took a different view of the second set of Facebook posts, which contained pictures and comments making fun of an accident at a related dealership. The accident involved a 13-year-old boy who was behind the wheel of a vehicle that crashed into a retaining pond. The employee posted pictures of the accident and made some inappropriate comments. The Board affirmed the ALJ's conclusion that the second set of posts did not constitute protected concerted activity because there was no connection to the employee's terms and conditions of employment. Ultimately, the ALJ and the Board held that the employee's discharge was not a violation of the NLRA because he was terminated for the non-protected posts, and not the posts regarding the sales event.

The Board also agreed with the ALJ that some of the employer's policies were overly broad in violation of the NLRA, including the employer's Courtesy Policy that provides as follows:

> "Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers as well as to their fellow employees. *No one should be disrespectful or use profanity or any other language which injures the image of the Dealership*." (Emphasis added).

The Board held that the prohibition on "disrespectful" conduct and "language which injures the image or reputation of the Dealership" could be reasonably construed by employees to prohibit protected activity, and therefore was deemed unlawful.

B. Social Media Policies Infringing on Section 7 Rights.

The Board recently issued its first decision regarding social media policies, finding that a policy was unlawfully overbroad in violation of the NLRA. The Board's ruling in this case follows the guidance published by the Board's Acting General Counsel ("AGC") and many ALJ decisions, thereby emphasizing the instructive nature of these previous publications and decisions.

1. Costco Wholesale Corp., 358 NLRB No. 106 (September 7, 2012)*. In this case, the Board found various aspects of Costco's social media policy to be unlawful including the following:

> "Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment."

The Board found that employees could reasonably construe this rule to prohibit Section 7 activities such as communications critical of Costco's treatment of its employees. The Board faulted the employer for not excluding Section 7 activity from the provision. In reaching its decision, the Board specifically rejected the argument that the rule was meant to ensure a civil and decent workplace. The Board distinguished prior cases upholding employer rules prohibiting employee conduct that is "malicious, abusive or unlawful," by stating that such rules were unambiguous and prohibited activity that would not otherwise be protected.

2. EchoStar Techs, LLC, No. 27-CA-066726 (September 20, 2012). The ALJ in this case found that the employer's social media policy chilled employees' Section 7 rights. The challenged portions of the policy (i) prohibited employees from "mak[ing] disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our or their products/services" and (ii) further prohibited

employees' participation in personal social media activities "with EchoStar resources and/or on Company time" without company authorization.

Relying on the Costco decision, the ALJ found the first provision impermissibly "chilled" Section 7 rights. The ALJ also found that a provision that prohibits employees from using social media on company time was unlawful, citing to a previous decision that held that "company time" does not clearly convey to employees whether activities are allowed during breaks, lunches and before or after work.

Notably, the ALJ rejected the employer's argument that its "savings" clause in the employee handbook that stated that all policies should be applied in a "manner that is legal" made the social media provisions lawful. The ALJ concluded that such a savings clause would not have a "reasonable" impact on an employee.

3. General Motors, LLC, 07-CA-53570 (May 30, 2012). In this case, an ALJ concluded that a number of prohibitions in the employer's social media policy did not violate the NLRA. In particular, the ALJ held that restrictions on the use of the employer's logo were lawful, finding that the employer had articulated a legitimate business reason for limiting use of its logo online, namely to prevent confusion about official communication. The ALJ also upheld a provision stating that:

> "Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."

The ALJ found that that the company's use of descriptive adjectives in the policy removed ambiguity from a general prohibition on offensive language.

On the other hand, the ALJ found the following provisions problematic:

> "Be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site . . . . Non-public company information includes. . . Personal Information about another GM employee, such as his or her. . . performance, compensation . . ."
>
> "When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with the GM Communications or GM legal to see if it is a good idea."

The ALJ found that these provisions could be construed to restrict communications about wages, require permission to engage in protected activities, and restrict protected activities like hand-billing.

While the policy contained a disclaimer stating that the employer would administer the policy in compliance with Section 7, the ALJ found that this savings clause did not cure the policy's defects. He concluded that "employees cannot be expected to know what conduct is protected under the Act."

C. Office of the General Counsel Issues Third Report on Social Media.

The Board's Office of the General Counsel has issued three reports (August 2011, January 2012, May 2012) related to social media. The August 2011 and January 2012 reports each detail the outcome of numerous cases involving the use of social media and employers' social and general media policies. The latest report issued by the AGC offers the clearest guidance so far on what constitutes a lawful social media policy under the NLRA. Although the reports do not constitute binding precedent, they provide useful guidance for employers that have implemented or are considering implementation of rules governing employee use of social media.

According to the AGC, employees could reasonably construe the following provisions, among others, to prohibit Section 7 activities:

1. Restrictions on releasing "confidential information" about co-workers as well as restrictions on sharing confidential information with co-workers.

2. Instructions to ensure that posts are "completely accurate and not misleading and that they do not reveal non-public company information on any public site."

3. Instructions directing employees "when in doubt" not to post information before checking with the employer's communication and/or legal department.

4. Prohibitions on posting photos, music, videos, quotes, and personal information without the owner's permission, and using the company's logo, in the absence of any explanation of the scope of those restrictions.

5. Instructions that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline," without examples eliminating ambiguity.

6. Instructions that employees should "think carefully about 'friending' co-workers" is overboard because it would discourage communication among co-workers.

7. Prohibitions against posting personal information about other employees and contingent workers, commenting on "legal matters," picking fights, engaging in controversial discussions, and airing complaints online.

In addition, the report makes clear that the AGC does not consider general disclaimers in social media policies - stating, for example, that they "will not be

construed or applied in a manner that improperly interferes with employees' rights under the NLRA" - to be effective in curing the defects in overbroad policies. In the AGC's view, employees "would not understand from this disclaimer that protected activities are in fact permitted."

In the recent report, the AGC found the following provisions lawful:

1. Prohibitions against "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."

2. Requirements that employees be "fair and courteous in the posting of comments, complaints, photographs or videos" where the policy lists, as examples, posts that could be "viewed as malicious, obscene, threatening or intimidating," and could amount to "harassment or bullying," or that could create a hostile or discriminatory work environment.

3. Requirements that employees maintain the confidentiality of employer's trade secret and confidential information, where the employer provided examples of prohibited disclosures that did not include protected communications.

IV. THE BOARD AND CONFIDENTIALITY.

Section 8(a)(1) of the NLRA has been read to bar employer interference with employees' rights to discuss the terms and conditions of their employment with others under Section 7. To this end, the Board has scrutinized confidentiality mandates, policies and procedures utilized by employers in the course of their everyday business operations to determine what effect, if any, they may have on "chilling" protected, concerted activity.

A. Confidentiality Mandates – Restrictions on Discussing Wages.

1. NLRB v. Northeastern Land Services, Ltd., 2011 U.S. App. LEXIS 12678 (1st Cir. June 2011). The Court of Appeals for the First Circuit affirmed the Board's order finding that a confidentiality provision in an agreement with an unrepresented employee interfered with the employee's Section 7 rights.

   In July 2000, temporary agency Northeastern Land Services, Ltd. (NLS) hired an employee to perform work for NLS's client, El Paso Energy. At the time he was hired, the employee received an offer letter setting forth the terms of his employment. The letter contained the following language: "Employee also understands that the terms of his employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal." According to NLS, the confidentiality agreement was intended to prevent NLS employees from dealing directly with clients regarding the terms of their employment. NLS further argued that the provision was not intended to prohibit NLS employees from discussing these issues among themselves, nor had it ever been enforced that way.

After complaining to NLS about repeated delays in receiving full compensation, including expense reimbursements, the employee spoke to his project manager at El Paso regarding the wage dispute with NLS. The employee was subsequently terminated by NLS for "not liv[ing] up to [his] end of the bargain with [NLS]." At hearing, NLS testified that the reference to the "bargain" was a reference to the employee's failure to comply with the confidentiality provision in his offer letter.

The ALJ that originally heard this case found that NLS's business justification for the confidentiality rule outweighed the "minor" infringement on the employees' Section 7 rights. The Board disagreed and the Court of Appeals affirmed. The Board held that even though the policy allowed employees to discuss compensation among themselves, employees would "reasonably construe the language of the rule to prohibit Section 7 activity." The Board cited as an example that the rule could be interpreted to bar the employee from discussing his compensation with a union representative – activity clearly protected by the NLRA. The Board did not entertain NLS's business justification argument due to Board precedent that the "mere maintenance" of a rule that would tend to chill Section 7 activity is unlawful.

2. Taylor Made Transp. Serv., Inc., 358 NLRB No.53 (June 7, 2012)*. The Board upheld an ALJ finding that the company violated an employee's Section 7 rights by suspending and terminating her for disclosing her wage rate.

   The company in this case maintained several employment policies that prohibited employees from disclosing pay rates and compensation data without a "valid reason." The charging employee discussed her pay with other co-workers and was counseled on this issue, and the company issued a location-wide reminder regarding the confidentiality of compensation information. The employee was ultimately terminated for failing to comply with the employer's confidentiality policy as well as other policies. Because wage discussion are at the core of Section 7 rights, the Board concluded that disciplining an employee for violating an overbroad rule that restricted such discussion was unlawful.

B. Confidentiality Mandates in Restrictive Covenant Agreements.

Quicken Loans, Inc., Case No. 28-CA-75857 (Jan. 8, 2013). In this case, the ALJ found that the company violated the NLRA by maintaining overly broad confidentiality and non-disparagement provisions in its Mortgage Banker Employment Agreement. The decision arose out of an unfair labor practice charge filed by a non-union employee who had been employed by Quicken as a mortgage banker and, after her resignation, was sued by Quicken for alleged violations of her post-employment restrictive covenant obligations to Quicken. The employee alleged that the Agreement she was required to sign interfered with her Section 7 rights and was therefore unenforceable.

In his decision, the ALJ considered the lawfulness of two provisions contained in the Agreement entitled (i) "Proprietary/Confidential Information" and (ii) "Non-Disparagement." The Agreement's Proprietary/Confidential Information provision required an employee to "hold and maintain all Proprietary/Confidential Information in the strictest of confidence" and further provided that an employee "shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity." The Agreement contained a definition of Proprietary/Confidential Information," which included any "nonpublic information relating to or regarding the Company's . . . personnel," including "personal information of co-workers . . . such as home phone numbers, cell phone numbers, addresses, and email addresses." The Agreement's Non-Disparagement clause prohibited employees from publicly criticizing, ridiculing, disparaging, or defaming Quicken. The ALJ found that the two provisions in the Agreement violated the NLRA because they "would reasonably tend to chill employees in the exercise of their Section 7 rights."

The ALJ reasoned that an employee, in complying with the restrictions of the Proprietary/Confidential Information section, would believe that he or she was prohibited from discussing his or her own wages and benefits, or the names, wages, benefits, addresses, or telephone numbers of his or her co-workers, with fellow employees or union representatives. For this reason, the ALJ concluded that the terms of the Agreement would substantially restrain employees from engaging in concerted activities permitted under the NLRA. The ALJ further reasoned that the Non-Disparagement provision could reasonably be read by an employee to restrict his or her right to engage in protected activities because employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometimes do so in appealing to the public, or to their fellow employees, in order to gain their support.

As a result of the ALJ's decision, Quicken Loans was ordered to rescind the "Proprietary/Confidential Information" and "Non-Disparagement" provisions of the Agreement for all its current and former employees.

C. Confidentiality Instruction and Workplace Investigations.

Banner Estrella Med. Ctr., 358 NLRB No. 93 (2012)*. The Board found an employment policy requiring employee confidentiality during workplace investigations to be unlawful. Notably, the policy was not a written rule, but rather a verbal instruction given to employees filing complaints with the Company's human resources consultant. Specifically, the consultant would regularly ask employees not to discuss the subject of the investigation with co-workers.

This case arose after an employee, whose job involved sterilizing surgical instruments, complained about the procedures he was instructed to follow in performing his job duties. Upon meeting with the Company's human resource consultant, the consultant asked the employee not to discuss the investigation of his complaint with others. The Board held that the statement had "a reasonable tendency to coerce employees" thereby interfering with their Section 7 rights. The

majority noted that such a prohibition may be permissible if an employer can demonstrate that it has a legitimate business justification that outweighs employees' Section 7 rights.

The Board went on to address the type of employer concerns that might justify a confidentiality policy under the NLRA. In particular, the Board stated confidentiality could be justified where (1) witnesses needed protection, (2) evidence might be destroyed, (3) testimony might be fabricated, or (4) when necessary to prevent a cover up.

V. THE BOARD AND AT-WILL HANDBOOK DISCLAIMERS.

Employers routinely incorporate at-will employment disclaimers in their employee handbooks. These provisions typically serve to notify employees that they have no contractual right to employment and that either they or their employers maintain the right to terminate the employment relationship for any or no reason. Recent ALJ decisions have indicated, however, that some common language used in at-will employment provisions may be unlawful under the NLRA.

A. **American Red Cross Arizona Blood Services Region, 28-CA-23443 (February 1, 2012).** The ALJ, in this case out of Arizona, found that the employer's at-will disclaimer could be reasonably construed by employees to prohibit protected, concerted activity. The charging party in this case was presented with an employee handbook that had an "authorization" form for her to sign. That form defined an "at-will" employment relationship and included the following acknowledgment:

> "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

The employee refused to sign the form, saying she did not agree with some of the at-will language. She was allowed to cross-out language on the form, and she signed the redacted copy. The relationship between the employee and her supervisor continued to deteriorate and she was eventually discharged for reasons that the employer contended were performance-based. The employee filed an unfair labor practice charge with the Board, alleging that she was fired for engaging in protected, concerted activity under the NLRA

The ALJ found the Red Cross guilty of unfair labor practices relative to its termination of the employee for engaging in protected, concerted activity and for maintaining the at-will language cited above. The ALJ reasoned that the signing of the acknowledgment form "is essentially a *waiver* in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status."

B. **Hyatt Hotels Corporation.** Hyatt Hotels settled a charge alleging that its at-will employment provision violated the NLRA. The relevant portions of the provision stated:

> "I acknowledge that no oral or written statement or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President."

The Board alleged that this language constituted the employer interfering with, restraining, and coercing employees in the exercise of rights guaranteed by the NLRA. It was recently announced that Hyatt agreed to change those policies, in response to the Board's complaint, on a nationwide basis.

C. The Acting General Counsel's Advice Memorandum.

On October 31, 2012, the AGC issued two advice memos clarifying an employer's obligations regarding at-will disclaimers in employee handbooks. In the first advice memo, Rocha Transportation, 32-CA-086799 (G.C. Div. of Advice Memo., October 31, 2012), the employer maintained the following policy:

> "Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing."

Similarly, the employer in the second advice memo, SWH Corporation, 28-CA-084365 (G.C. Div. of Advice Memo., October 31, 2012), maintained the following at-will policy statement in its employee handbook:

> "The relationship between you and Mimi's Café is referred to as 'employment at-will.' This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at-will' relationship. Nothing contained in this handbook creates an express or implied contract of employment."

The AGC concluded in both cases that the employers' employment at-will provisions "would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status," since neither provision bars employees from attempting to change their at-will status. Rather, the policies merely provide that the companies' representatives do not have authorization to enter into employment agreements that are not "at-will." In finding both provisions lawful, the AGC distinguished the *Red Cross* decision because its prohibition interfered with the employee's ability to change his/her at-will status through the use of union representation or other non-company representatives.

VI. WHAT CAN WE EXPECT IN THE FUTURE?

A. Continued Protection of Section 7 Rights.

Despite legal uncertainty regarding the validity of decisions issued since early 2012, the Board continues to hear cases and issue decisions. We fully expect that the board will continue to aggressively protect Section 7 rights in the union and non-union setting, and issue more decisions related to social media and confidentiality mandates.

B. Cases Likely To Be Overturned.

We also anticipate that existing Board decisions will be revisited and may be overturned. The following are Board decisions that we anticipate may be overturned during the Obama administration.

1. Register Guard, 351 NLRB 1110 (2007), enforcement denied in part, 571 F.3d 53 (D.C. Cir. 2009). In *Register Guard*, the Board applied a narrow discrimination test, requiring proof of discriminatory application of the employer's email policy to union and non-union communications. Thus, under the Board's current ruling, employees have no "right" to use the employer's email system for Section 7 purposes. Commentators believe that, moving forward, the Board may adopt a rule that prohibits employers from denying access to unions for solicitation purposes if it allows employees to engage in any other form of non-work communication, thereby essentially guaranteeing employees' access to email for union purposes.

2. IBM Corp., 341 NLRB No. 148 (June 9, 2004). In *IBM Corp.*, the Board held that non-union employees do not have a right to co-worker representation at investigatory interviews. *IBM Corp.* is the most recent in a series of "flip flop" decisions issued by the Board relative to representation rights for non-union employers. Commentators believe that the current Board may find that such representation is inherent to Section 7 rights and will require employers to allow representatives in investigatory interviews.

3. BE&K Construction Co., 351 NLRB 451 (2007). In this case, the Board held that the employer did not violate the NLRA by filing and maintaining a

reasonably based, but ultimately unsuccessful, lawsuit against the union, regardless of the employer's motive for initiating the lawsuit. Under the current standard, even if the employer's lawsuit is unsuccessful, the employer would not be in violation of the NLRA – and not responsible for the costs of the union's legal defense – unless the union can sustain its substantial burden of proving the lawsuit was undertaken for a retaliatory motive and there is no reasonable basis for the employer to believe the action would be successful. Commentators believe that the Board may revisit this issue and apply a more balanced approach to weighing the interests of employees under the NLRA and companies to exercise their first amendment rights. This could mean that reasonable but malicious prosecution could expose employers to liability under the NLRA.

4. HS Care, LLC (Oakwood Care Center), 343 NLRB 659 (2004). The Board in this case held that temporary employees from a staffing agency cannot be included in a bargaining unit with regular employees of the employer without the consent of the staffing agency and regular employer. The current Board will likely reverse this decision based on the rationale that denying union membership to temporary employees, absent consent, bars a sizable group of employees from organizing.

5. Jones Plastic & Engineering Co., 351 NLRB 61 (2007). The Board in this case clarified the reinstatement rights of economic strikers by holding that an employer can lawfully decline to reinstate economic strikers even where the employer had classified the replacement workers as "at will" employees. Commentators believe that when the current Board has an opportunity to review this issue, they will require more than an "at will" employment relationship with replacement workers to enable an employer to refuse to rehire an economic striker after an unconditional offer to return to work.

GODFREY & KAHN S.C.

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Restrictive Covenant Trends and Ways Your Business Can Take Advantage of Them

Introduction

- Restrictive covenant law changes rapidly.
- These changes affect the drafting and enforcement of restrictive covenants.
- Wisconsin restrictive covenant law has seen significant change in the past decade.
- This presentation focuses on recent trends (and some potential trends) in the drafting and enforcement of restrictive covenants

The Basics

- Wis. Stat. § 103.465 v. "rule of reason."
  - Strict construction v. looser construction.
  - Employment v. non-employment (*e.g.*, sale of business).
  - No blue pencil v. blue pencil.

- Star Direct, Inc. v. Dal Pra, 2009 WI 76, 767 N.W.2d 901 (Wis. 2009).
  - The new touchstone in Wisconsin.
  - Effects have just begun to percolate through the system.

Star Direct: The New Touchstone

- Facts.
  - Traditional route salesperson case.
  - Dal Pra entered into restrictive covenant agreement when Star Direct acquired his employer.
  - New employment and a contingent $30,000 bonus.
  - Traditional non-compete, customer non-solicitation, and confidentiality provisions.
  - Dal Pra quits to compete against Star Direct.

Star Direct: The New Touchstone

- Significant new interpretation principles:
  - Courts should *not* read a restrictive covenant provision unreasonably in order to find it unreasonable and unenforceable.
  - Courts are to "rightly and fairly" interpret restrictive covenant agreements.
  - Avoid absurd results; give words plain meaning; read contracts as a whole; give effect to every provision.

Star Direct: The New Touchstone

- Consideration: (1) new employment and (2) $30,000 contingent bonus.

- Customer non-solicitation provision: Legitimate interest in protecting current and "recent past customers."
  - Legacy employees who had not signed the new agreement did not void signed agreements.

- Non-competition provision: Unenforceable due to overbreadth.

Star Direct: The New Touchstone

- Confidentiality provision: Enforceable with two – year restriction and no geographic limit.

- Divisibility:
  - Unenforceable provisions could be severed from enforceable ones after fact-sensitive inquiry.
  - No divisibility if intertwining, or inextricable link, in text such that one provision cannot be read or interpreted without the other.
  - Divisibility when different covenants support different, independent interests.

Trend No. 1: Using Divisibility

- Create stand-alone restrictions by segregating definitions into their respective provisions.
- If the circumstances warrant, consider including separate restrictive covenant provisions which may have some risk of enforceability.
  - For example, “prospective” customer protections.
- Include a severability clause (without blue-pencil language).

Trend No. 2:
Use Star Direct On Offense

- When a plaintiff, use Star Direct as a tool against motions to dismiss/for summary judgment.

- Unreasonable hypothetical situations should no longer be the norm in interpretation.

- There is no *per se* invalidity to a restrictive covenant, as no fact-based assessment exists with such an approach.

Trend No. 3: Avoid § 103.465 When Possible

- Inclusion of restrictive covenant provisions in certain equity grant agreements may improve the chance of enforceability.

- Wis. Stat. § 103.465 v. "rule of reason."

- The Selmer Co. v. Rinn et al. (Wis. App. 2010)
  - Stock option award (actual equity).
  - Employee was not forced into agreement.
  - Failure to sign agreement would not affect employment.
  - Unclear if phantom equity causes same result.

Trend No. 4: Boilerplate Still Matters

- Accordia of Ohio, L.L.C. v. Fishel (Ohio 2012).
  - Corporate merger context.
  - Two-year non-compete triggered at termination.
  - No successorship and assignment language.
  - Result: Due to lack of successor language, non-compete was triggered at sale of predecessor.
    - Though Accordia acquired the right to enforce the two-year period immediately after it was triggered.

- Note the importance of severability clause under Star Direct.

Trend No. 5: Potential Trends

- Inevitable disclosure doctrine.
  - PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995)
  - Inevitable trade secret disclosure creates protective non-compete.

- Business-to-business covenants.
  - Antitrust concerns.
  - Heyde Companies.

- Garden leave provisions.

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24TH ANNUAL LABOR & EMPLOYMENT LAW UPDATE
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RESTRICTIVE COVENANT TRENDS AND WAYS YOUR BUSINESS CAN TAKE ADVANTAGE OF THEM

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RESTRICTIVE COVENANT TRENDS AND WAYS YOUR BUSINESS CAN TAKE ADVANTAGE OF THEM

I. INTRODUCTION.

The law affecting the drafting and enforcement of restrictive covenant agreements changes rapidly due to court decisions and legislation which alter the approach to drafting and litigating these documents. The drafting and enforcement of restrictive covenants in Wisconsin is not immune from these swift changes. This presentation will highlight some of the recent trends in the drafting and enforcement of confidentiality, non-competition and other restrictive covenant provisions.

II. STAR DIRECT, INC. V. DEL PRA – A PRIMER ON WISCONSIN'S NEW TOUCHSTONE

In Wisconsin, the most significant development to occur in restrictive covenant law in decades arose with the Supreme Court of Wisconsin's decision in Star Direct, Inc. v. Dal Pra, 2009 WI 76, 767 N.W.2d 901 (Wis. 2009). Star Direct and its new perspective on Wisconsin's restrictive covenant statute, Wis. Stat. § 103.465, have altered the drafting of restrictive covenant agreements in the state and the approach to enforcement of such agreements. In order to understand the drafting and litigation trends created by Star Direct, it is useful to understand the basics of the case.

A. Facts. Star Direct was in the business of distributing novelties and sundries to convenience stores, service stations, truck stops and travel centers throughout the Midwest. The business is highly competitive and is dependent on route salespeople in specified territories to make and build relationships with customers and potential customers of the business. Dal Pra was a route salesperson employed by a business which Star Direct acquired, and, when it acquired Dal Pra's employer, Star Direct offered Dal Pra a similar route salesperson position. Star Direct's employment offer to Dal Pra included a route nearly identical to the one he held with the acquired business together with a $30,000 bonus upon the completion of 30 months of service with Star Direct. In return, Dal Pra signed an agreement which contained a traditional geography-based non-competition provision, a customer non-solicitation provision and a confidentiality provision. Dal Pra worked for Star Direct for approximately four years, collected the promised bonus and then voluntarily quit his employment with Star Direct to establish his own competing distribution company. Based on the agreement signed by Dal Pra, Star Direct sought to enjoin Dal Pra from breaching the agreement and competing with Star Direct's business.

B. Supreme Court Contract Interpretation Principles. In evaluating the restrictive covenant provisions at issue in Star Direct, the Supreme Court of Wisconsin enunciated a number of general principles of contract interpretation applicable to restrictive covenants in Wisconsin. These general principles set the drafting and enforcement of restrictive covenant agreements in Wisconsin in a new light.

1. While restrictive covenant provisions are to be read in favor of the employee, this does not mean that courts are to make an effort to read a restrictive covenant provision unreasonably in order to find it unreasonable and unenforceable against the employee. 2009 WI 76 at ¶ 62.

2. A court's task in reviewing a restrictive covenant provision under Wisconsin law is to rightly and fairly interpret such provisions as contracts. Id.

3. Courts must interpret restrictive covenant provisions: (a) so as to avoid absurd results, (b) giving the words their plain meaning, (c) reading them as a whole, and (d) giving effect where possible to every provision. Id.

These contract interpretation principles have affected the drafting of restrictive covenant agreements in Wisconsin and, perhaps more significantly, the enforcement of them in the courts.

C. Restrictive Covenant Provision Issues.

1. Consideration. In Star Direct, the Supreme Court of Wisconsin appeared to affirm two types of consideration supportive of the restrictions imposed on Dal Pra: (a) new employment and (b) a monetary bonus ($30,000) contingent upon the completion of 30 months of service. Id. at ¶ 50.

2. Customer Non-Solicitation Provision. The customer non-solicitation provision of the Star Direct restrictive covenant agreement was held reasonable and enforceable by the Supreme Court of Wisconsin and, in doing so, the court reasoned as follows:

   a. An employer has an interest in prohibiting the solicitation of its current and "recent past customers." Id. at ¶ 40

      i. A route salesman, like Dal Pra, obtains significant knowledge regarding the employer's business that can be used against the business.

      ii. Through his or her employment and because of the employer's investment in the employee, such an employee would have serviced, dealt with or had special knowledge about these customers.

      iii. An employer has a general interest in winning back the business of its "recent past customers." Under the facts of Star Direct, a one-year look-back period regarding such past customers was not too long to be unreasonable.

   b. Given the fact that Star Direct had been consistent in having all new route salespeople sign restrictive covenant agreements after 2002, the fact that some salespeople employed prior to 2002 had not signed such agreements did not cause those that were signed to be unenforceable.

3. Traditional Non-Compete Provision. The traditional non-competition provision of the Star Direct restrictive covenant agreement was overbroad and not reasonably necessary for the protection of the company. Id. at ¶ 56.

   a. The phrase in the traditional non-competition provision prohibiting employees from engaging in any business which "is substantially similar to or in competition with" the business of Star Direct was overbroad, because a "substantially similar" business cannot, by definition, refer to the same thing as a business "in competition with" Star Direct.

   b. The majority viewed the "substantially similar" phrase and the disjunctive "or" following it as an attempt to bar employees, not only from competitive enterprises, but also from engaging in business that was substantially similar to Star Direct's business but not competitive.

4. Confidentiality/Non-Disclosure Provision. The majority determined that the only reasonable construction of the confidentiality provision, read as a whole, was that it prohibited employees from use of Star Direct's confidential information as identified in the examples listed in the agreement (*i.e.*, information of a confidential and sensitive nature that, if made public or used by Dal Pra, would be deleterious to Star Direct's business). As a result, the provision was found to be reasonable and enforceable. Id. at ¶ 64.

   a. Note that the confidentiality provision contained a two-year time limitation and no territorial limitation. The majority indicated, however, that Dal Pra had not raised as issues the duration or geographic scope of the provision.

D. Divisibility. Perhaps the most significant holding of Star Direct involves the majority's finding that an unenforceable restrictive covenant provision is divisible from an enforceable provision if, when the unenforceable provision is stricken from the contract, the other provisions may be understood independently and enforced.

1. This is a fact-sensitive inquiry, dependent on the totality of the circumstances.

2. Indivisibility will usually be evidenced by an intertwining, or inextricable link, between the various provisions via a textual reference such that one provision cannot be read or interpreted without a reference to the other.

3. Divisibility will be evidenced when the contract contains different covenants supporting different interests that can be independently read and enforced.

4. Overlap of protectable interests, even substantial, between clauses is not necessarily determinative of divisibility.

III. TRENDS IN DRAFTING AND ENFORCEMENT OF RESTRICTIVE COVENANT PROVISIONS.

A. Trend No. 1 – When Drafting, Take Advantage of Divisibility. As a result of Star Direct's approach to divisibility, drafters of Wisconsin restrictive covenant agreements should take advantage of the court's approach and draft separate restrictive covenant provisions so that their language is not intertwined and so that one provision can be read and interpreted without reference to another.

1. Drafting Tips. In attempting to take advantage of Star Direct's approach to divisibility, the following drafting tips may be applicable:

   a. Severability Clause. Overtly include a provision that approves of the severability of the agreement's provisions, but be careful not to include language that could be interpreted to give the court authority to "blue pencil" the agreement or its provisions. For example:

      > Severability. The obligations imposed by, and the provisions of, this Agreement are severable and should be construed independently of each other. The invalidity of one provision shall not affect the validity of any other provision.

   b. Segregate Definitions of Defined Terms into Their Respective Provisions. While the creation of a "definitions" section for defined terms used in a restrictive covenant agreement may be an efficient and elegant way to draft an agreement – especially when a defined term is used more than once in the agreement – given the divisibility holding in Star Direct it is advisable to place each defined term with its respective restrictive covenant provision to which the term applies.

      i. *Note:* This approach may cause a defined term to be defined more than once in an agreement.

2. If the Circumstances Warrant the Additional Risk, Consider Including Separate Restrictive Covenant Provisions Which May Historically be More Likely to be Found Unenforceable. Star Direct's holding regarding divisibility may provide organizations which are more risk tolerant to include restrictive covenant provisions in their restrictive covenant agreements which are more aggressive as to enforceability by segregating them from other provisions of the agreement.

   a. *Example*: Historically, attempts to protect a company's "prospective customers" were relatively risky in Wisconsin, as courts considered there to be little to no protectable interest in such prospects since they had not yet been converted to customers. Star Direct did not address prospective customer restrictions.

While the Wisconsin courts' skepticism regarding the protectable interest associated with prospective customers may or may not have changed post-Star Direct, given Star Direct's holding regarding divisibility, a company may choose to attempt to reasonably protect such prospects by drafting a self-contained restrictive covenant provision aimed solely at prospective customers. In theory, if a court finds such a provision to have no protectable interest or to be overbroad, it should, under Star Direct, sever such a provision from otherwise enforceable restrictive covenants in the same agreement.

B. Trend No. 2 – Use Star Direct on Offense in Litigation. When trying to enforce a restrictive covenant agreement in Wisconsin, Star Direct provides plaintiffs with arguments as to why defense motions to dismiss and motions for summary judgment should be denied.

1. Unreasonable Hypotheticals Should No Longer Be the Norm. Historically, in deciding on the reasonableness of a restrictive covenant provision, courts have created hypotheticals which are used to find a provision overbroad and unreasonable. In order to avoid this result, plaintiffs should remind courts of Star Direct's language specifying that courts are not to make an effort to read a restrictive covenant provision unreasonably in order to find it unreasonable and unenforceable against the employee.

    a. Similarly, plaintiffs should remind courts of Star Direct's guidance to interpret restrictive covenant provisions: (i) so as to avoid absurd results, (ii) to give the words their plain meaning, (iii) read as a whole, and (iv) to give effect where possible to every provision.

2. **Motions to Dismiss.** With the new judicial approach to restrictive covenant provisions ushered in by Star Direct, plaintiffs seeking enforcement of a restrictive covenant provision may have more success overcoming motions to dismiss. Courts may be more amendable to the argument that there is no *per se* invalidity to a restrictive covenant based on case law like the following:

> [W]hat is reasonable varies from case to case, and what may be unreasonable in one instance may be very reasonable in another . . . Thus a *per se* rule *offends the notion that the validity of a restrictive covenant is to be established by examination of the particular circumstances which surround it*. Whether the determination of the reasonableness of a noncompetition agreement is characterized as a question of law or one of fact, *it still remains one which can be made only upon consideration of factual matters*.

Rollings Burdick Hunter of Wisconsin, Inc. v. Hamilton, 101 Wis.2d 460, 468, 304 N.W.2d 752 (Wis. 1981) (emphasis added).

C. Trend No. 3 – Inclusion of Restrictive Covenant Provisions in Certain Equity Grant Agreements May Avoid § 103.465 Interpretation. In some circumstances, inclusion of restrictive covenant provisions in certain equity grant agreements may be a more effective way of creating legally enforceable restrictions on employees than inclusion of such provisions in an employment agreement.

1. Wis. Stat. § 103.465. Wisconsin's statute governing restrictive covenants in employment contracts reads as follows:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

   a. Prior to the enactment of Wis. Stat. § 103.465, restrictive covenants in Wisconsin – even in the employment context – were subject only to a "rule of reason." See, e.g., Lakeside Oil Co. v. Slutsky, 8 Wis.2d 157, 98 N.W.2d 415 (1959).

   b. Wis. Stat. § 103.465 did not alter the common law "rule of reason" in cases outside of the employment context. See, e.g., Reiman Associates, Inc. v. R/A Advertising, Inc., 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981) (common law requirements, not Wis. Stat. § 103.465, governed validity of a covenant not to compete incident to the sale of a business).

2. The Selmer Co. v. Rinn et al., 2010 WI App 106, 789 N.W.2d 621 (Wis. App. 2010). In Rinn, the Court of Appeals of Wisconsin held that a set of restrictive covenant provisions included in a *stock option agreement* offered to an employee were governed by the more lenient "rule of reason" and not by Wis. Stat. § 103.465.

   a. Facts. In Rinn, Rinn was a high-level executive employee of The Selmer Co. and, in that capacity, was given the opportunity to purchase stock in The Selmer Co.'s parent company at a reduced price pursuant to the terms of a stock option agreement. The agreement contained relatively broad customer non-solicitation and confidentiality provisions. Rinn signed the agreement *but was not forced to do so*, and, *had he chosen not to sign the agreement, his employment with the company would not have been affected in any way*. Rinn exercised his

options for a substantial gain and subsequently resigned from the company to work for a competitive business.

b. Holding. The court held that the restrictive covenants of the option agreement fell outside of the scope of Wis. Stat. § 103.465 and within the common law "rule of reason." As a result, the court – using the lower level of scrutiny applied under the "rule of reason" analysis – found the provisions to be reasonable and enforceable. In doing so, the court stated:

> [U]nlike typical restrictive covenants, upon which a prospective employee's position may depend, there were no consequences to Rinn's refusal to accept the agreement. The circuit court found Rinn was not pressured to sign the stock option agreement, nor was his employment conditioned upon his doing so. Indeed, the circuit court found Rinn's refusal would not have affected his employment in any way.

Id. at ¶ 21.

i. As a result, Rinn supports the use of the more lenient "rule of reason" in circumstances where actual equity – in the form of exercisable stock options in this case – are offered to an employee in a manner that has no impact on the employee's employment.

ii. It is unclear from Rinn whether a similar result would arise in the context of phantom equity grants.

D. Trend No. 4 – Boilerplate Still Matters. When drafting, analyzing and litigating restrictive covenant agreements, companies should be conscious to review the "boilerplate" language of the agreement as it can have important ramifications on the interpretation of the agreement's provisions. For example:

1. Accordia of Ohio, L.L.C. v. Fishel. In Accordia of Ohio, L.L.C. v. Fishel, Slip Opinion No. 2012-Ohio 2297, the Ohio Supreme Court held that, under Ohio law, non-competition agreements that do not contain successorship and assignment language may go into effect at the time of a merger rather than at the time of an employee's termination of employment with the successor company.

a. Facts. In Accordia, Accordia sought to enforce the non-compete agreements of four employees who left the company in August 2005 to work for a competitor. Each employee had signed a two-year non-compete agreement with a predecessor company, which specified that the non-compete restrictions would be triggered upon the employee's termination of employment with the predecessor

company. Subsequently, the employees became employed by the successor, Accordia, by way of two separate mergers in 1997 and 2001, respectively. Notably, none of the four non-compete agreements contained any language extending the agreements to the predecessor company's successors or assigns. Accordia argued that because employee contracts transfer to the successor company in a merger, Accordia should be able to enforce the non-compete agreements as if it stepped into the shoes of the original, predecessor entities. The employees argued that because the non-compete agreements did not contain successorship or assignment language, they could not be enforced by Accordia.

b. Holding. The Ohio Supreme Court agreed with the employees, holding that because the employees' original non-compete agreements did *not* contain successorship or assignment language, Accordia could not "step into the shoes" of the predecessor entities who had originally signed the agreements. The court reasoned that because Ohio law holds that, in a merger, the absorbed company ceases to exist as a separate business entity, the employees' employment with the predecessor entities terminated at the time of the mergers. Because the agreements specified that termination of employment with the "company" (meaning the predecessor entity) triggered the beginning of the two-year non-compete period, the court ruled that the employee's non-compete periods began to run at the time of the mergers and expired two years following the mergers. While the court ruled that Accordia did acquire the right to enforce the non-compete agreements for the two-year period directly following the mergers, all four employees' non-compete agreements had expired by the time they left the company in 2005. Accordingly, the court ruled that Accordia could not enforce the non-compete agreements.

E. Trend No. 5 – Miscellaneous Potential Trends.

1. Inevitable Disclosure Doctrine. The inevitable disclosure doctrine, originally enunciated in PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995) remains unaddressed by Wisconsin's courts. The doctrine, as originally upheld by the United States Court of Appeals for the Seventh Circuit, applies when a former employee will inevitably disclose to his or her new employer trade secrets and confidential information in such a manner that an injunction preventing the employee from assuming duties with the new employer is warranted.

   a. To date, no Wisconsin court has addressed the inevitable disclosure doctrine, and the one Wisconsin federal district court case, Square D Co. v. Van Handel, 2005 WL 2076720 (E.D. Wis. 2005), which faced the issue did not squarely address it, other than to be skeptical of it in the context of a concern for employee mobility.

2. Business-to-Business Restrictive Covenants. Restrictive covenant agreements between employers are agreements between two companies to limit the recruitment of each other's employees. Depending on the circumstances, these agreements may run afoul of antitrust laws, and, in Wisconsin, are unlikely to be enforceable in most cases under Wisconsin law.

   a. In Wisconsin, this issue may already have been decided. In Heyde Companies, Inc. d/b/a Greenbriar Rehabilitation v. Dove Healthcare, LLC, 2002 WI 131 (Wis. 2002), the Supreme Court of Wisconsin addressed an agreement between a staffing company and one of its customers that placed a limited restriction on the right of the customer to hire or employ those employees placed at the customer by the staffing agency. In sweeping language, the Supreme Court of Wisconsin suggested that all such contracts are inherently unreasonable and unenforceable under Wisconsin law.

      i. The contract in the case, entered into between Greenbriar Rehabilitation and Dove Healthcare, LLC, read as follows:

> [Dove] acknowledges and agrees that it will not, directly or indirectly, solicit, engage, permit to be engaged or hire any Greenbriar therapist or therapist assistants to provide services for [Dove] independently, as an employee of [Dove] or as an employee of a service provider other than Greenbriar or otherwise during the term of this Agreement. …and for a period of one (1) year thereafter, without the prior written consent of Greenbriar. If, after prior written consent by Greenbriar, any Greenbriar therapists or therapist assistants are hired or utilized by [Dove], [Dove] shall pay Greenbriar a fee of fifty percent (50%) of the subject Greenbriar employee's annual salary.

      ii. Although the Supreme Court criticized the reasonableness of this particular provision, its condemnation of the contract was far-reaching and seemed to foreclose any such contracts between a staffing agency and its customer:

> A no-hire provision that restricts the employment opportunities of employees without their knowledge and consent is harsh and oppressive to the employees, in violation of Wis. Stat. § 103.465 and the public policy of the state.

3. Garden Leave Provisions. So-called "garden leave" provisions originated in the United Kingdom and refer to a type of agreement by which an employee remains on a company's payroll for a set period of time after an employment separation in return for an agreement by the employee not to work during the "garden leave" period. Such a provision effectively creates a non-

compete period while providing the former employee with continued income and benefits.

a. These types of provisions have not, as of yet, entered the Wisconsin employment marketplace, and it is unclear whether a Wisconsin court would uphold such a provision if challenged or would analyze it as a restrictive covenant.

GODFREY & KAHN S.C.

24th Annual Labor & Employment Law Update
Spring 2013

Developments in the Law of Arrest and Conviction Record Discrimination: How to Manage Them to Avoid Liability

Recent Statistics

- July 2012 survey conducted by the Society for Human Resources Management (SHRM):
  - 69% conduct criminal background checks on all of their job candidates.

Recent Statistics

- 62% of those that conduct criminal background checks initiate the process after a contingent job offer.

- 52% conduct criminal background checks to reduce legal liability.

- 49% conduct criminal background checks to ensure a safe work environment.

History of Arrest and Conviction Record Law in Wisconsin

- WFEA enacted in Wisconsin in 1945.
- Initially covered race, creed, color, national origin, and ancestry.
- Arrest and conviction record protection added in 1977.

General Provisions of Wisconsin's Arrest and Conviction Record Law

- Definitions:
  - Arrest record.
  - Conviction record.
  - Substantially related.

General Provisions of Wisconsin's Arrest and Conviction Record Law

- Arrests:
  - It is unlawful discrimination to request an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest.
  - Exception → pending charges and other limited exceptions (discussed later).

General Provisions of Wisconsin's Arrest and Conviction Record Law

- Convictions:
  - It is unlawful discrimination to refuse to employ or terminate a person because of his or her conviction record unless the circumstances of the offense substantially relate to the circumstances of the particular job or licensed activity.

General Provisions of Wisconsin's Arrest and Conviction Record Law

- Substantially Related Test:
  - No legal responsibility to analyze and conclude at the time of termination or suspension that the *crime or pending charge* is substantially related.
  - Objective legal standard applied after the fact by a reviewing tribunal.
  - It is an affirmative defense.

General Provisions of Wisconsin's Arrest and Conviction Record Law

- Substantially Related Test:
  - General contours were addressed in 1987 by the Wisconsin Supreme Court in County of Milwaukee v. LIRC.
  - Clarification provided in subsequent LIRC decision.
  - Robertson v. Family Dollar Stores.
  - CAUTION → substantial relationship test is the most heavily litigated issue in arrest and conviction record discrimination case.

Nuances of Arrest Record Law

- Arrest inquiries on applications.
- Exceptions to employment discrimination.
  - Bondability.
  - Pending criminal charges.
- Arrest for conduct while on the job.

Nuances of Conviction Record Law

- Exception to the general rule.
  - Cannot *refuse to employ or terminate* a person because of his or her conviction record *unless* the circumstances of the offense substantially relate to the circumstances of the particular job or licensed activity.
  - Cannot terminate before conviction is complete if employee is on unpaid suspension during pendency of criminal charge and is then convicted.

Nuances of Conviction Record Law

- Exceptions to employment discrimination.
  - Bondability.
  - Private detectives and other private security personnel.
  - Installer of burglar alarms.
  - Dealing with alcoholic beverages.
  - Convicted of a felony and not been pardoned for that felony.

Nuances of Conviction Record Law

- Length of time since offense is not relevant to "substantially related" test.

- No obligation to take affirmative steps to accommodate individuals convicted of felonies.

Recent Activity from the EEOC

- Title VII does not expressly prohibit discrimination on the basis of arrest or conviction record.

EEOC's April 2012 Guidance

- Guidance states:
  - An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate Title VII's prohibition against employment discrimination.
    - Potential for race and national origin discrimination.
  - Discusses the difference between arrest and conviction records.

EEOC's April 2012 Guidance

- Guidance discusses disparate treatment discrimination.
- Employers will "consistently meet the 'job related and consistent with business necessity' defense" if it develops a "targeted screen" process.
- Targeted Screen Considers:
  - Nature of the crime;
  - Time elapsed since the crime; and
  - Nature of the job.

EEOC's April 2012 Guidance

- Individualized assessment.

- Compliance with other federal laws a defense.
  - Example → Financial institution laws prohibiting employment of individuals convicted of specific crimes.

EEOC's April 2012 Guidance: Ramifications for Wisconsin Employers

- Federal law and the EEOC's interpretation of federal law preempts any state law.

- Arrests:
  - Time since conviction or conduct leading to arrest is a significant factor in determining whether there is discrimination on the part of the employer.

EEOC's April 2012 Guidance: Ramifications for Wisconsin Employers

- Convictions:
  - Under Wisconsin law, period of time that has elapsed since an offense is *not* relevant in deciding whether a conviction is "substantially related" to the job.
  - EEOC guidance notes that the time that has elapsed is important.
- Individualized assessment:
  - Under EEOC guidance, individualized assessment favored.
  - Under Wisconsin law, there is no individualized assessment.

EEOC's April 2012 Guidance: Ramifications for Wisconsin Employers

- Opportunity to be heard and level of consideration is not required under Wisconsin law.
  - Likely now required under federal law.
- Substantial relationship test still needed.
- Future of the EEOC's Guidance.
  - Court review.

Practical Scenarios: Language on Employment Applications

- Limit applicant's disclosure of arrests to pending charges.

- Include disclaimer language:
  - Example (WI): "*Convictions and/or pending charges will not be considered unless they substantially relate to the job for which you are applying.*"

  - Example (multi-state): "*Convictions and/or pending charges will only be considered as allowed by applicable state law.*"

Practical Scenarios: The "Onalaska Defense"

- Onalaska v. LIRC.
  - The independent investigation exception.
  - If terminated based solely upon the conduct underlying the arrest or conviction AND it has been independently confirmed by an internal investigation, termination is not discriminatory.
  - CAUTION → Will violate the law if termination is based – even in part – upon an arrest or conviction.

Practical Scenarios: The "Onalaska Defense"

- Source must be independent from the arrest and arresting authorities.
  - Police reports.
  - Criminal complaint.
  - Statements made by or other information provided by the arresting or prosecuting authority.

- "Part and parcel" of an arrest record itself - Betters v. Kimberly Area Sch.

Practical Scenarios: Absences Due to an Arrest

- Wisconsin law.
  - Objective attendance policies or point systems can be enforced against an individual who has been arrested pending charges.

- Federal law.
  - Disparate impact?

Practical Scenarios: Suspension With or Without Pay

- Most severe → suspend without pay or benefits.

- Can only be done if the charged crime is substantially related to the job.

Recently Enacted and Pending Legislation in Wisconsin

- 2011 Wisconsin Act 83.
  - Applies to educational agencies .
  - Allowed to fire or to refuse to hire a person who has been convicted of a felony whether or not if circumstances of offense are substantially related to the circumstances of the job.

The Future of Arrest and Conviction Record Discrimination in Wisconsin

- Business community is intent on further reform.
- Anticipate future legislative activity.

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24TH ANNUAL LABOR & EMPLOYMENT LAW UPDATE
SPRING 2013

DEVELOPMENTS IN THE LAW OF ARREST AND CONVICTION RECORD DISCRIMINATION: HOW TO MANAGE THEM TO AVOID LIABILITY

GODFREY & KAHN S.C.

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DEVELOPMENTS IN THE LAW OF ARREST AND CONVICTION RECORD DISCRIMINATION: HOW TO MANAGE THEM TO AVOID LIABILITY

RECENT STATISTICS

I. HISTORY OF ARREST AND CONVICTION RECORD LAW IN WISCONSIN.

A. Wisconsin Fair Employment Act.

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B. Arrest and Conviction Record Protection.

-

II. GENERAL PROVISIONS OF WISCONSIN'S ARREST AND CONVICTION RECORD LAW.

A. Definitions.

B. General Rule of Law.

-

C. Substantially Related Test.

D. Nuances of Arrest Record Law.

to refuse to employ or license or to suspend if the circumstances of the charge substantially relate

most severe

per se

E. Nuances of Conviction Record Law.

refuse to employ or terminate

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III. RECENT ACTIVITY FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

A. Federal Law.

B. EEOC Guidance.

-

C. Ramifications for Wisconsin Employers.

D. Future of the EEOC's Guidance.

IV. PRACTICAL SCENARIOS IN ADDRESSING ARREST AND CONVICTION RECORDS.

A. Language on Employment Applications.

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B. The "Onalaska Defense."

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C. Absences Due To an Arrest.

D. Suspension With or Without Pay.

V. RECENTLY ENACTED AND PENDING LEGISLATION IN WISCONSIN.

A. Recently Enacted Legislation.

B. Recent Pending Legislation.

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VI. THE FUTURE OF ARREST AND CONVICTION RECORD DISCRIMINATION IN WISCONSIN.

A. The Business Community is Intent on Further Reform of the Arrest and Conviction Record Law in Wisconsin.

B. Future Legislative Activity.

VII. COMMENTS, QUESTIONS, EXAMPLES.

APPENDIX A

POTENTIAL ARREST AND CONVICTION RECORD QUESTIONS AND ANSWERS

Does this question include any arrests that I may have had?

If I answer "yes" to this question, am I disqualified from the job?

Does my particular conviction for _____ disqualify me from the job?

How are you going to make the decision regarding whether or not my conviction disqualifies me from the job?

When will you make a decision regarding whether or not my conviction disqualifies me from the job?

How does the law define conviction record (or anything else)?

How should I answer this application question regarding conviction records?

What will happen if I refuse to answer this question regarding conviction records?

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LABOR, EMPLOYMENT & IMMIGRATION

The laws and regulations governing the employment relationship are constantly evolving. The attorneys in our Labor, Employment & Immigration Law Practice Group help businesses successfully navigate this complicated legal landscape by providing proactive advice in all areas of labor, employment and immigration law. The goal of our Practice Group is to recognize and understand the issues affecting your workforce and leverage the team's collective experience to deliver practical solutions that meet your business needs effectively and efficiently.

We offer a broad range of services regarding the complex web of statutory, judicial and regulatory authority concerning workplace matters. Our attorneys work closely with the firm's corporate lawyers to address the often complex labor and employment matters that arise in acquisitions and sales of businesses. We also negotiate and litigate in the defense of labor and employment-related claims, maintaining ongoing contact with the full range of governmental agencies involved in labor and employment matters, including the National Labor Relations Board, the Occupational Safety and Health Administration (OSHA), the Department of Labor-Wage and Hour Division, the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, the Bureau of Citizenship and Immigration Services, the Wisconsin Employment Relations Commission, the Wisconsin Department of Workforce Development, and similar agencies throughout the country.

Here is an overview of our practice:

Affirmative Action Plans and Compliance

Our Labor, Employment & Immigration Law Practice Group works with local, state and federal government, and government contractors and subcontractors to develop and implement affirmative action plans. We also assist our clients with concerns arising out of governmental affirmative action plan audits, which can present unique challenges, ranging from interpreting audit requests, negotiating penalties and implementing actions to address any violations.

Avoidance and Defense of Wrongful Discharge and Related Employee Claims

The assertion of common law state claims like defamation, intentional infliction of emotional distress, and wrongful discharge claims are among the fastest growing threats to employers. Many of these claims, unlike most governed by civil rights laws, are not subject to limitations on the recovery of compensatory and punitive damages. Claims by non-union employees that their employers have retaliated against them for lawful concerted activity protected under the National Labor Relations Act are also growing in frequency. Our Labor, Employment & Immigration attorneys anticipate these issues and prepare effective defenses against these claims in whatever forum they are asserted.

Civil Rights Claim Defense

When employers find themselves named as respondents or defendants in discrimination claims, our Labor, Employment & Immigration Law Practice Group promptly offers a full range of assistance, including legal and business advice, as well as litigation counsel. We have extensive experience representing employer interests before the Equal Employment Opportunity Commission, the Equal Rights Division of the Wisconsin Department of Workforce Development, and other federal, state and local agencies. Our Practice Group has had great success

representing employers charged with discrimination violations in both state and federal trial courts, and state and federal courts of appeal.

Employee Benefits and Executive Compensation

We understand that employment relationships necessarily include employee benefit and tax issues. All members of our Practice Group work closely with members of our Tax & Employee Benefits Practice Group to address employee benefit plan concerns, including administration questions related to employment terminations.

HR Advice & Counseling

Our Labor, Employment & Immigration Law Practice Group prides itself on working with clients to prevent or minimize the risk of employee claims. With an increasingly tangled web of civil rights laws, court-created employee protection and employee leave laws, even the most routine employment decision can create employer risks. Working closely with employers, the practice group also helps develop systems to ensure that hiring practices, attendance policies, employee handbooks, drug testing, employee performance reviews and other employer practices and procedures do not become breeding grounds for legal claims. We assist employers in the development of strategies to deal with problem employees and reductions-in-force in a manner that leaves employers in the best position to defend themselves against claims. Examples of advice and counsel we regularly provide include:

- Assistance regarding compliance with myriad federal, state and local laws and regulations that bear on the employment relationship
- Conducting training for managers and supervisors on unlawful harassment, diversity and equal employment opportunity issues, effective supervision and other labor and employment law topics
- Conducting sexual harassment, discrimination and other employment investigations
- Advising management on employee counseling and discipline
- Helping employers develop and revise personnel policies, procedures and manuals
- Advising management on matters including wage-hour compliance, affirmative action, employee privacy, plant closings and mass layoffs, employee testing, restrictive covenants and trade secrets and employee benefits
- Assisting employers through audits and investigations with the U.S. Department of Labor's Office of Federal Contract Compliance, Wage and Hour Division, and OSHA
- Analyzing workforce data and helping our clients comply with the WARN Act and the Older Workers Benefit Protection Act as they design and implement downsizing programs
- Assisting employers with I-9 audits

HR Training

Members of our Labor, Employment & Immigration Law Practice Group regularly offer practical training for managers, supervisors and employees on workplace issues and developments in the laws affecting employees. Our Legal Resource Training Program provides interactive, informative training with the benefit of our legal knowledge in a variety of employment areas including unlawful harassment, family and medical leave, accommodating employees with disabilities, performance reviews, and workplace violence. To encourage clients to be proactive, the firm generally offers Legal Resource Training on a flat fee basis.

Immigration

As the business world expands globally, more and more companies need to employ foreign personnel in the United States to grow their businesses and maintain their competitive edge.

Members of our Labor, Employment & Immigration Law Practice Group counsel our clients on the best strategy for bringing foreign personnel on board and maintaining their valid immigration status. Our understanding of our clients' business and needs enables us to prepare effective immigration-related applications and petitions without unforeseen delays or unpleasant surprises. We streamline the process and stay up-to-date on ever-changing immigration procedures and standards so our clients and their human resources departments can focus on what they do best.

Our Practice Group also counsels and assists with family-based immigration and other issues affecting foreign-national individuals and their families.

We handle all manner of business immigration filings, including H-1Bs, TNs. L-1s, Es, and the various steps of the permanent residence process. We also counsel clients on worksite enforcement compliance, including I-9s and E-Verify.

Labor Relations and Collective Bargaining

Our Labor, Employment & Immigration Law Practice Group has provided counsel to public and private sector employers across the complete labor relations spectrum from union organizing drives through decertification. Along the way our experienced staff works exclusively with employers in collective bargaining and labor contract administration, including grievance arbitration and unfair labor practice complaint proceedings.

Collective Bargaining – We have acted as chief spokesperson for management in collective bargaining with countless unions and have effectively provided behind-the-scenes counsel to those employers who choose to handle their own collective bargaining. We routinely provide the following services:

- Critique of union proposals
- Drafting employer proposals
- Acting as spokesperson at the bargaining table or advising behind the scenes
- Developing a strategy to ensure the negotiated agreement meets business needs
- Managing communications with employees and the media
- Providing experienced representation at mediation/conciliation
- Providing legal representation at related labor board hearings

Labor Litigation – Our Practice Group has represented employers before the National Labor Relations Board (NLRB) and Wisconsin Employment Relations Commission in unfair labor practice proceedings, injunction proceedings, grievance and interest arbitration proceedings, union decertification matters, and appellate work relating to the enforcement of NLRB and WERC decisions.

Mediation and Arbitration – Our Practice Group has handled hundreds of disputes concerning the interpretation of collective bargaining agreements. Many differences of opinion can be resolved through negotiation or mediation while others require resolution before an independent arbitrator. The Practice Group also handles

interest arbitration cases arising in public safety employee contract disputes that define the terms of a collective bargaining agreement.

Public Sector Representation – We have significant experience in the representation of cities, counties, towns, villages, school districts, technical colleges, utilities, sewerage districts, and other municipalities in all aspects of labor relations and employment law, including extensive experience in negotiating and administering collective bargaining agreements. Members of the Practice Group routinely provide counsel to public administrators on employee rights issues and assist in developing effective post-2011 Wisconsin Act 10 management and policy implementation strategies.

In addition to such public-sector labor and employment issues, our attorneys provide advice concerning Wisconsin's open meetings law, public records issues, conflict of interest matters, and liability of public officials.

Mergers, Acquisitions & Due Diligence

Our Labor, Employment & Immigration Practice Group counsels employers respecting the labor and employment law issues arising out of corporate mergers and acquisitions, including advice on workforce restructuring, reductions-in-force, employee transitioning and employment liabilities. In addition, our Practice Group advises privately and publicly held companies throughout the due diligence process. Our mergers and acquisitions experience includes assisting on complex international transactions with multi-jurisdictional challenges and tailoring purchase, employment and restrictive covenant agreements accordingly.

Workers' Compensation Matters

Our Labor, Employment & Immigration Law Practice Group regularly provides advice and representation to employers facing uninsured claims under the Wisconsin Workers' Compensation Act. Wisconsin law provides, for example, that employers are solely liable for penalties for unreasonably refusing to rehire an employee who has experienced a work-related injury and for claims that it provided an unsafe working environment. These claims are not covered by workers' compensation insurance, but require close coordination between the employer's defense team and the workers' compensation insurer.

International

Collaborating with attorneys in the United States and internationally, we provide clients with advice and support related to employment and labor issues throughout the world. Our Practice Group counsels clients on the establishment and conduct of business operations in, among other places, the People's Republic of China, India, Guam, Spain, Portugal, France and the United Kingdom.

Non-Compete, Confidentiality and Other Restrictive Covenant Agreements

Whether an employer is considering hiring an individual subject to an agreement restricting post-employment competition, or is interested in protecting its own customer relationships or confidential information from competition from employees or former employees, we provide business and legal counsel respecting such contracts. In jurisdictions such as Wisconsin, which is particularly hostile to restrictive covenants in the employment context, employers who depend on enforceable agreements should avoid a "cookie-cutter" approach, and, thus, our Practice Group provides individualized attention to these issues.

Wage and Hour Law Counsel

The minimum wage, overtime, and child labor provisions of state and federal law vary in important ways. Our Labor, Employment & Immigration Law Practice Group assists employers in properly classifying employees as exempt or non-exempt from overtime requirements, outlining restrictions on the work minors may perform, analysis of overtime requirements, hours worked, and related issues.

OSHA

We provide advice concerning OSHA compliance, the agency's right of access to employer property, informal settlements, alternative enforcement initiatives, and penalty contest proceedings.

Unemployment Benefits

Our Labor, Employment & Immigration Law Practice Group represents employers in planning personnel actions to minimize unemployment taxes and assessments and in defending claims for benefits in administrative proceedings and court appeals.

GODFREY & KAHN S.C.

Labor, Employment & Immigration Practice Group Member Biographies

Practice Areas

Business

- Labor, Employment & Immigration
- Health Care

Madison

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JON E. ANDERSON

Jon Anderson serves as Chair of the Labor & Employment Law Practice Group. He exclusively represents management in all aspects of human resource, labor, and employment law matters. A significant portion of his practice is devoted to the representation of public, private and Charter schools, as well as serving as general or special counsel to school districts and institutions of higher education. Jon also is a member of the firm's Health Care Team, representing health care institutions and hospital systems in their employment and collective bargaining matters.

Jon brings years of experience, and a practical no-nonsense approach to advising employers in labor and employment matters, and in helping them defend decisions they make concerning their employees. Jon counsels employers on matters involving employee discipline, personnel administration, employment discrimination and wage/hour claims, and in resolving matters arising under a wide range of state, federal and local laws including the Wisconsin Fair Employment Act, Title VII, the ADEA and the ADA.

Jon has extensive experience advising both union and non-union employers concerning their rights and obligations under the National Labor Relations Act. He is frequently engaged to help employers define and attain their collective bargaining goals. Jon routinely counsels employers on union elections and labor contract administration matters and regularly represents management in grievance arbitration and interest arbitration proceedings. Jon also represents management in mediation proceedings and unfair labor practice hearings arising in a union setting.

Jon is a native of Oconomowoc, Wisconsin, but practiced in Milwaukee and Sheboygan before joining Godfrey & Kahn as a shareholder in 1991. He is actively involved in a variety of community activities and provides pro bono services to several community organizations. Jon is a frequent speaker at educational seminars and workshops on a variety of employment law, labor law, and education law matters.

Admissions and Activities

Admitted to Practice

Wisconsin

Court Admissions

United States Court of Appeals, Seventh Circuit
United States District Court, Eastern District of Wisconsin
United States District Court, Western District of Wisconsin
United States Supreme Court

Professional Association Memberships

American Bar Association
Council of School Attorneys of the National School Boards Association
Education Law Association
National Association of College and University Attorneys
State Bar of Wisconsin
Wisconsin School Attorneys Association (Past President)

Activities

American Bar Association - Law School Liaison for University of Wisconsin and Marquette University
Capitol West Academy (Board President, Executive Committee, Governance Committee)
Edgewood College (Guest Lecturer/Mentor)
Education Law Association (Board of Directors, 2010 - Present)
Madison Club (Board of Directors)
St. Aemilian-Lakeside, Inc. (Board of Directors)
State Bar of Wisconsin - Labor & Employment Law Section
National Association of College and University Attorneys (Investment & Finance Committees)

Honors

Listed in *The Best Lawyers in America* (Education Law, Labor & Employment Law, 2006 - 2013)
Listed in *The Best Lawyers in America* (Employment Law - Management Lawyer of the Year, 2012 - 2013)
Recognized as a Wisconsin Super Lawyer (2005 - 2012)
Listed in *Who's Who in American Law*

News, Updates & Events

News & Publications

Jon Anderson quoted in "Longer Arm of the Law" (In Business Madison)
December 07, 2012

Jon Anderson quoted in "Representing districts is more complicated than ever" (The National Law Journal)
September 10, 2012

Skeletons in the Closet? Minimizing the Risks of Background Checking
September 04, 2012

Jon Anderson featured as "Professional of the Week" (InBusiness)
August 14, 2012

Jon Anderson and Tom O'Day featured in "Concealed Carry Questions"
(Beloit Daily News)
October 07, 2011

Jon Anderson mentioned in "Firm eyed to manage digital school" (Ozaukee Press)
February 23, 2011

Encyclopedia of Law and Higher Education
January 14, 2010

Labor & Employment Vantage Point
December 02, 2009

Employee Free Choice Act Introduced - Are You Prepared?
April 20, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Genetic Information Non-Discrimination Act
May 23, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008

Risks of Sharing Wage Information with Competitors
August 01, 2007

Godfrey & Kahn Updates

Labor & Employment Vantage Point
August 10, 2010

Events

2012 Education Law Association Annual Conference
November 07, 2012

2012 WERC Annual Seminar
April 26, 2012

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

2011 Education Law Association Annual Conference
November 09, 2011

2010 WERC Annual Seminar
April 29, 2010

2009 Education Law Association Annual Conference
October 24, 2009

National Academy of Arbitrators Seminar
April 29, 2009

2008 WERC Annual Seminar
May 01, 2008

Labor Law Update WPELRA Convention
January 24, 2008

School Administrators and Online Student Speech - ELA 52nd Annual Conference
November 16, 2007

Accountability Begins in the Classroom
ELA 51st Annual Conference
November 17, 2005

Education

Juris Doctor, Marquette University Law School, *Alpha Sigma Nu*
Bachelor of Arts, University of Wisconsin-Madison, Behavioral Science and Law

Practice Areas

Business

- Labor, Employment & Immigration

Litigation

- Labor & Employment Litigation

Green Bay

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ANNIE L. EIDEN

Annie L. Eiden is an associate in the Green Bay office of Godfrey & Kahn, S.C. and is a member of both the Labor and Employment and Litigation Practice Groups.

Annie earned her law degree, *magna cum laude*, from the University of Minnesota Law School in Minneapolis, Minnesota. While in law school, Annie was a member of the Wagner Labor and Employment Law Moot Court national competition team and worked as a student attorney in the University of Minnesota Workers' Rights Clinic. Annie received her Bachelor of Arts degree, *with highest distinction*, from the University of Wisconsin.

Admissions & Activities

Admitted to Practice

Wisconsin - 2008

Professional Association Memberships

American Bar Association
State Bar of Wisconsin

News, Updates & Events

News & Publications

Annie Raupp quoted in "Facebook Follies" (InBusiness Wisconsin)
March 30, 2012

Annie Raupp mentioned in "Business Briefs" (Green Bay Press Gazette)
September 11, 2011

Annie Raupp featured in "Baer, Scray honored as Women of Vision"
(Green Bay Press Gazette)
June 21, 2011

Labor & Employment Vantage Point
December 02, 2009

Rebecca Hamrin, Adam Loomans, Wendy Richards, Eric Weiss, Claire Finando, Monica Santa Maria, Andrew Turner, and Annie Raupp mentioned in "New Faces, New Places" (Milwaukee Journal Sentinel)
October 20, 2008

Education

Juris Doctor, University of Minnesota Law School, *magna cum laude*
Bachelor of Arts, University of Wisconsin-Madison, *highest distinction*

Practice Areas

Business

- Labor, Employment & Immigration

Milwaukee

780 North Water Street
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EMAIL · rgaytan@gklaw.com

RUFINO GAYTÁN III

Rufino Gaytán is an associate member of the firm's Labor & Employment Practice Group in Milwaukee. Rufino assists private and public employers in addressing general human resource issues and counsels employers in every aspect of labor and employment law. In particular, Rufino provides assistance with discrimination claims, wage and hour issues and drafting and enforcing restrictive covenant agreements. Rufino also represents clients before the Equal Employment Opportunity Commission and the Wisconsin Equal Rights Division.

Prior to law school, Rufino served in the U.S. Army Reserve as a member of B Company, 980th Engineer Combat Battalion in San Antonio, Texas. He attained the rank of Sergeant and served in Iraq from March 2004 - March 2005. Rufino was awarded the Army Commendation Medal and the Combat Action Badge for his service in Iraq.

Admissions and Activities

Admitted to Practice

Wisconsin – 2009
Texas – 2009

Court Admissions

United States District Court, Eastern District of Wisconsin
United States District Court, Western District of Wisconsin

Professional Association Memberships

American Bar Association
State Bar of Texas
State Bar of Wisconsin
Eastern District of Wisconsin Bar Association
Milwaukee Bar Association

News, Updates & Events

News & Publications

Scott LeBlanc & Rufino Gaytán mentioned in "Wisconsin Broadcasters Association Hosts Social Media Seminar" (radioworld.com)
December 20, 2012

Christine McLaughlin and Rufino Gaytan authored "NLRB says requesting confidentiality during internal investigations violates Section 7 rights" (InsideCounsel)
August 13, 2012

Christine McLaughlin and Rufino Gaytan authored "Arbitration agreements and class action waivers legal under NLRA" (InsideCounsel)
July 30, 2012

Christine McLaughlin and Rufino Gaytan authored "The 3rd Circuit adopts a joint employer test to determine FLSA liability" (InsideCounsel)
July 16, 2012

Christine McLaughlin and Rufino Gaytan authored "Supreme Court rejects the DOL's outside sales exemption interpretation" (InsideCounsel)
July 02, 2012

Christine McLaughlin and Rufino Gaytan authored "Running a union-free workplace doesn't make you safe from NLRB meddling" (InsideCounsel)
June 18, 2012

Christine McLaughlin and Rufino Gaytan authored "Labor: When employees are eligible for multiple FLSA overtime exemptions" (InsideCounsel)
June 04, 2012

Christopher Smessaert, Daniel Blinka, Erin "Maggie" Cook, Shannon Brusda, Jessica Franklin, Rufino Gaytan III, Peggy Heyrman, Rebecca Lauber and Joshua Torres were mentioned in "In the News" (Wisconsin Lawyer).
December 01, 2009

The States as Laboratories for Social Experiments: A Proposal Asking President Obama to Use the National Guards to Reason Our Way Out of 'Don't Ask, Don't Tell'
May 01, 2009

Godfrey & Kahn Updates

Mexican Federal Labor Law Reform: Opportunities and Challenges for Employers with Operations in México
December 11, 2012

NLRB Issues Final Rule
September 15, 2011

Labor & Employment Vantage Point
August 10, 2010

One More Victory For Employers In The Non-Compete Agreement Realm
July 22, 2010

Labor & Employment Vantage Point
December 02, 2009

Education

Juris Doctor, University of Wisconsin law School, 2009
Bachelor of Arts, The University of Texas at Austin, 2003, Government

Practice Areas

Business

- Labor, Employment & Immigration

Litigation

- Labor & Employment Litigation

Green Bay

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JOHN A. HAASE

John A. Haase is a shareholder in the Labor and Employment and Litigation Law Practice Groups of Godfrey & Kahn, S.C. He serves as the Office Managing Partner of the Firm's Green Bay and Appleton offices. John is engaged in a broad-based employment law practice, representing employers in matters before equal rights agencies, arbitrators and federal and state courts. A substantial amount of John's practice involves advising employers on a variety of employment issues, such as non-compete agreements, terminations, FMLA, ADA, NLRA and wage and hour matters.

John maintains an active employment litigation practice dedicated to advocating for employers in employment and labor disputes. He has represented businesses in class action, discrimination, wage and hour, non-compete and unfair labor practices matters. John represents clients in a number of industries, including manufacturing, consumer products, retail, health care service and public sector.

John began his law practice in the U.S. Army Judge Advocate General's Corp where he served as a trial attorney.

Representative Experience

Successful defense of health care system in class action alleging unpaid overtime related to meal break policy.

Represented consumer products manufacturer in a collective action brought by 58 former employees alleging age discrimination. Successfully enforced the majority of release agreements at issue in the matter at summary judgment.

Lead defense counsel in a collective action brought by former employees claiming violations of the Fair Labor Standards Act's on-call pay rules and regulations. Obtained summary judgment dismissing all of plaintiffs' claims. (*Roland, et al. v. Unity Hospice, LLC*, Case No. 07-C-1103, E.D. Wis., 2010).

Defense of manufacturer in lawsuit alleging violations of the Americans with Disabilities Act and the Age Discrimination in Employment Act. Following discovery, the court granted summary judgment dismissing all of the plaintiff's claims. (*Nuetzel v. Oshkosh Corporation*, Case No. 07-C-1045, E.D. Wis., 2007).

Represented a public employer in defense of wrongful termination claims brought by two former employees. The plaintiffs alleged race and gender discrimination under Title VII of the Civil Rights Act of 1964; they also alleged the denial of due process with regard to the loss of their employment. The court granted summary judgment dismissing all of the plaintiffs' claims. (*Bowman-Farrell v. CESA 8*, Case No. 02-C-818, E.D. Wis., 2007).

Successful defense of national information management firm in action alleging pregnancy discrimination. The court dismissed the Plaintiff's claims on summary judgment. (*Jobelius v. SourceCorp*, Case No. 05-C-191, E.D. Wis. 2005).

Represented a professional accounting firm in an action to enforce non-competition agreements against three departing employees. Successfully obtained a preliminary injunction which prevented the former employees from engaging in any further violations of their non-compete agreements. (*Wipfli LLP v. Metz, et al.*, Case No. 03-CV-403, Oneida County Circuit Court, 2004).

Defended employers in a wide variety of grievance arbitration matters (brought by unions such as United Auto Workers, Teamsters, International Brotherhood of Boilermakers, WEAC and AFSCME) addressing questions of just cause for termination, layoffs, work hours and other issues under labor agreements.

Obtained summary judgment for school district in defense of an age discrimination claim, including appeal to the United States Court of Appeals for the 7th Circuit. (*Tiedt v. Manitowoc Public School District*, Decision No. 98-3631).

Obtained summary judgment on behalf of trucking company facing claim of race discrimination. (In RE ANR Advance Transportation Co., Case No. 99-22155 JES, United States Bankruptcy Court, Eastern District of Wisconsin).

Negotiated health insurance concessions, pay issues, management right clauses and related issues during collective bargaining on behalf of management.

Admissions & Activities

Admitted to Practice
Pennsylvania - 1991
Wisconsin – 1996

Court Admissions
Federal Trial Courts of Pennsylvania
United States Court of Appeals, Seventh Circuit
United States District Courts, Eastern & Western Districts of Wisconsin, and various other District Courts

Professional Association Memberships
American Bar Association
Brown County Bar Association
State Bar of Wisconsin

News, Updates & Events

News & Publications

John Haase quoted in "NOSD reluctant to make labor moves" (Ozaukee Press)
March 16, 2011

John Haase and C. Wade Harrison were quoted in "Report: Harter violated ethics code" (La Crosse Tribune)
July 28, 2010

John Haase was quoted in " Risky Business" (Corporate Report)
July 01, 2009

John Haase, Daniel Finerty and Thomas Shorter authored "New S.B. 20 Authorizes Circuit Courts to Award Compensatory and Punitive Damages" (State Bar of Wisconsin)
June 17, 2009

John Haase was quoted in "Giving Time for Money Away" (Corporate Report for Wisconsin)
June 01, 2003

John Haase was mentioned in "Protecting your Intangible Assets"
August 01, 2000

Godfrey & Kahn Updates

Labor & Employment Vantage Point
August 10, 2010

Labor & Employment Vantage Point
December 02, 2009

Enforcing Non-Compete Agreements Just Got A Little Bit Easier
July 24, 2009

Events

2012 Labor & Employment Seminars
March 20, 2012

Education

Juris Doctor, Valparaiso University of Law, *magna cum laude*
Bachelor of Business Administration, St. Norbert College

Practice Areas

Business

- Labor, Employment & Immigration
- Health Care

Litigation

- Labor & Employment Litigation

Madison

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C. WADE HARRISON

C. Wade Harrison is a member of the Labor, Employment & Litigation and Health Care Practice Groups in the Madison office. Wade's practice involves advising and representing both private and public employers in a variety of labor and employment matters. Among other things, Wade focuses primarily on counseling regarding and defending against employment discrimination and civil rights claims (including unlawful harassment and race, age, sex, disability and other discrimination matters), family and medical leave issues, and wrongful discharge claims. Wade provides counseling to employers on the full range of human resource and employment law challenges confronted by public and private sector employers, including the hiring and firing of employees, drafting and enforcing restrictive covenant agreements, litigating federal and state discrimination and wage claims, conducting unlawful harassment investigations, and drafting employment and severance agreements. Wade also trains supervisors and employees on human resource topics such as unlawful harassment. Additionally, Wade's practice encompasses working with educational institutions as general or special counsel.

Wade has appeared before the Wisconsin Equal Rights Division, Equal Employment Opportunity Commission, United States Department of Education - Office of Civil Rights, Wisconsin state courts, United States District Court for the Western District of Wisconsin and United States Seventh Circuit Court of Appeals.

Wade received his Bachelor's Degree in Psychology from Loyola University, Chicago, graduating cum laude with minors in Women's Studies and African American Studies.

Before starting his career in law, Wade worked in California and Chicago gaining experience in international trade and human resources.

Representative Experience

Norman-Nunnery v. Madison Area Technical College, et al. United States Court of Appeals for the Seventh Circuit (November 8, 2010: Seventh Circuit affirms summary judgment in favor of prospective employer dismissing claims of spoliation of evidence, race discrimination, and intimate association discrimination).

Norman-Nunnery v. Madison Area Technical College, et al. (United States District Court for the Western District of Wisconsin) (March 5, 2009: Summary judgment in favor of prospective employer dismissing race discrimination and intimate association discrimination claims).

Admissions and Activities

Admitted to Practice
Wisconsin - 2007

Professional Association Memberships
State Bar of Wisconsin
American Health Lawyers Association
Dane County Bar Association
Defense Research Institute
Society for Human Resource Management
Wisconsin Hotel & Lodging Association
American Society for Healthcare Human Resources Administration
American Bar Association

Activities
United Cerebral Palsy - Dane County, Board President
Urban League of Greater Madison, Board Member

Honors
Recognized as a Wisconsin Rising Star (2011-2012)
Wisconsin Lawyer *Up and Coming Lawyer Award (*2009)

News, Updates & Events

News & Publications
C. Wade Harrison and Jed Roher featured in "40 Under 40: The 2013 Class" (In Business Magazine)
February 01, 2013

Thomas Shorter and C. Wade Harrison co-authored "The Wage and Hour Headache: Searching for a Cure"
(American Health Lawyers Association Connections)
November 09, 2012

Kendall Harrison and C. Wade Harrison mentioned as featured speakers in "August Health, Labor and Employment Law Institute: Register by Aug. 13 for Early-bird Savings" (InsideTrack)
July 05, 2012

C. Wade Harrison author "NLRB Issues Final Rule" (American Health Lawyers Association)
December 22, 2011

John Haase and C. Wade Harrison were quoted in "Report: Harter violated ethics code" (La Crosse Tribune)
July 28, 2010

Wade Harrison was quoted in "Employers: Watch for Potential Complication in New Domestic Partner Benefit" (IBMadison.com)
August 18, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Genetic Information Non-Discrimination Act
May 23, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008

Richard J. Bliss and C. Wade Harrison were featured in "Good for Business: Diversity initiatives at local law firms can be replicated in any business" (BusinessWatch, November 2007)
December 03, 2007

Rick Bliss, Danielle Machata and Wade Harrison (Godfrey & Kahn Fellowship in Law recipient) were quoted in, "Diversity at Work: Law Firm Provides Opportunities for Minorities." (Small Business Times)
October 27, 2006

Godfrey & Kahn Updates

NLRB Issues Final Rule
September 15, 2011

Labor & Employment Vantage Point
August 10, 2010

Labor & Employment Vantage Point
December 02, 2009

Worksite Enforcement Update
July 29, 2009

New No-Match Rule Enacted
November 20, 2008

Events

Wisconsin Hospitality & Lodging Association - "Employment Issues in the Lodging Industry"
October 23, 2012

State Bar of Wisconsin - "2012 Employment Law Update - Arrest and Conviction Record Discrimination in Wisconsin" (Milwaukee & Madison)
October 18, 2012

Wisconsin Society for Human Resource Management 2012 Conference - "Entering the Lion's Den of Arrest and Conviction Record Discrimination in Wisconsin"
October 03, 2012

Wisconsin Medical Society Webinar Presentation - "Social Media: Are You Still My Friend?"
August 29, 2012

State Bar Health Law Institute Panel Presentation - "Hot FLSA Issues Today in the Healthcare Field"
August 23, 2012

Wisconsin Broadcasters Association - "Discrimination Law for Broadcasters - Legal Issues and Effective Strategies to Prevent Unlawful Discrimination During the Employment Relationship"
June 20, 2012

American Health Lawyers Association - "Why Use Social Media and Social Networking? Reputation Monitoring and Background Checks"
May 22, 2012

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

Lorman Education Services - "Social Media & Employment Issues: The Good, The Bad & The Ugly"
February 15, 2012

Wisconsin Broadcasters Association - "Hiring Smart for Broadcasters: Legal Issues in Hiring and Effective Strategies to Promote Equal Employment Opportunity and Prevent Unlawful Discrimination"
January 25, 2012

Tri-County Human Resources Association - "Social Media & Employment Issues: The Good, The Bad & The Ugly"
November 16, 2011

Wisconsin Society for Human Resource Management - "Understanding Collective Action Lawsuits - How Can You Prepare Now"
October 13, 2011

Group Health Cooperative of South Central Wisconsin - "Social Media & Employment Issues: The Good, The Bad & The Ugly"
October 04, 2011

Monroe Schools Inservice - "Work Improvement Plans"
July 20, 2011

Dane County 2011 Supervisory Training - "Social Media & Employment Issues: The Good, The Bad & The Ugly"
June 03, 2011

Wisconsin Medical Society Panel Presentation - "Legal Issues in the Workplace: The Employer and Employee Perspective"
May 24, 2011

Wisconsin Organization of Nurse Professionals - "Social Media & Health Care: The Good, The Bad & The Ugly"
April 07, 2011

Labor & Employment Presentation at Marquette University
March 29, 2011

2011 Godfrey & Kahn Labor & Employment Seminars
March 15, 2011

Wisconsin Broadcasters Association Conference - "Avoiding Discrimination in Employment Terminations"
January 26, 2011

Education

Juris Doctor, University of Wisconsin Law School
Bachelor of Science, Loyola University of Chicago, 1995, *cum laude*

Practice Areas

Business

- Labor, Employment & Immigration

Waukesha

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JOHN J. KALTER

John Kalter is a shareholder in the Labor and Employment Law Practice Group in the Milwaukee and Waukesha offices of Godfrey & Kahn, S.C. where he practices management-side employment and labor law. John counsels employers regarding all aspects of employment and labor law and litigates such matters in state and federal agencies and courts.

John specializes in, among other things, counseling regarding and defending against employment discrimination and civil rights claims (including unlawful harassment and race, age, sex, disability and other discrimination matters), family and medical leave issues, wrongful discharge claims, and Fair Credit Reporting Act issues. John provides counseling to employers on the full range of human resource and employment law challenges confronted by private sector employers and trains supervisors and employees on human resource topics such as unlawful harassment. He also provides counseling regarding the employment and labor matters that are integral to business sales, mergers and acquisitions, and other corporate restructuring, including employment and labor due diligence, employee selection and retention, restrictive covenant agreements, and plant closing/mass layoff and reduction-in-force issues. John co-authored an article in the February 2002 *Wisconsin Lawyer* magazine entitled "Wisconsin Courts Struggle with Geography in Nonsolicitation Agreements."

John received his undergraduate degree with distinction from Cornell University, his master's degree in journalism and mass communication from the University of Wisconsin-Madison, and his law degree, *magna cum laude* and Order of the Coif, from the University of Minnesota.

John was the vice president of marketing and sales for a family-owned business. He is a member of the Wisconsin State Bar Association and the Milwaukee Bar Association. John is also licensed to practice before the United States District Court for the Eastern District of Wisconsin and before the Seventh Circuit Court of Appeals.

Admissions & Activities

Admitted to Practice

Wisconsin - 1994

Court Admissions

United States District Court, Eastern District of Wisconsin
United States Court of Appeals, Seventh Circuit

Professional Association Memberships
Milwaukee Bar Association
State Bar of Wisconsin

Activities
Human Resource Management of Southeastern Wisconsin (HRMA) - Member
St. Aemilian-Lakeside, Inc. - Secretary, Director, Finance Committee
Integrated Family Services - Secretary, Director

News, Updates & Events

News & Publications
John Kalter quoted in "The perils of Twitter, Facebook: Firms advised to frequently update social media policy" (The Business Journal of Milwaukee)
July 06, 2012

John Kalter interviewed in "Zen & The Art of Recruiting: The Legalities of Social Media" (Milwaukeejobs.com)
June 28, 2012

John Kalter and Todd Cleary quoted in "Can employers discriminate based on health status?" (InBusiness Wisconsin)
April 03, 2012

John Kalter quoted in "Does your business have a social media policy working for you?" (examiner.com)
March 09, 2012

John Kalter, Todd Cleary and Meg Kurlinksi quoted in "Labor and Employment Law: Be Aware" (Wisconsin Community Banking News)
April 01, 2011

Labor & Employment Vantage Point
February 23, 2011

John Kalter authored "Friend Me: An Employment Law Perspective on Social Media" (On Balance-The Magazine for WIsconsin CPAs)
December 01, 2010

John Kalter quoted in "Employers Beware" (Milwaukee BizTimes)
November 26, 2010

John Kalter was quoted in "More hospital systems want doctors to agree not to compete" (The Business Journal)
May 22, 2009

John Kalter was quoted in "State's high court reviews noncompete contracts" (The Business Journal)
March 24, 2008

John Kalter was quoted in "Noncompete Agreements: Friend or Foe?" (Corporate Report Wisconsin)
February 01, 2007

Wisconsin Courts Struggle with Geography in Nonsolicitation Agreements
February 01, 2002

Godfrey & Kahn Updates

Labor & Employment Vantage Point
August 10, 2010

Department of Labor Fact Sheet Details New Break Time Requirement for Nursing Mothers
July 27, 2010

New Wisconsin Law Adds Extra Requirements For Employee Notice Under Wisconsin Business Closing Law
January 07, 2010

Events

2012 Godfrey & Kahn Corporate Counsel Symposium
November 01, 2012

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

Employee Privacy: Drawing the Line Around Employee Privacy Interests
February 22, 2006

Employee Privacy: Drawing the Line Around Employee Privacy Interests
February 21, 2006

Understanding Unemployment Compensation: A Primer on Working Within Wisconsin's Unemployment Compensation System
Waukesha Labor & Employment Breakfast Roundtable
June 15, 2005

Understanding Unemployment Compensation: A Primer on Working Within Wisconsin's Unemployment Compensation System
Waukesha Labor & Employment Breakfast Roundtable
June 14, 2005

Don't Let Temporary Workers Become a Permanent Liability: Avoiding Liability Associated with Temporary Employees
Waukesha Labor & Employment Breakfast Roundtable
March 16, 2005

Quirky Questions: Case Studies Highlighting Common Human Resources Issues and Their Solutions
Waukesha Labor & Employment Breakfast Roundtable
November 17, 2004

Quirky Questions: Case Studies Highlighting Common Human Resources Issues and Their Solutions
Waukesha Labor & Employment Breakfast Roundtable
November 16, 2004

The Successful Termination: How To Terminate So You Don't Have To Litigate
Waukesha Labor & Employment Breakfast Roundtable
September 15, 2004

The Successful Termination: How To Terminate So You Don't Have To Litigate
Waukesha Labor & Employment Breakfast Roundtable
September 14, 2004

An Employer's Guide to Taking Advantage of the New FLSA Overtime Rules
Waukesha Labor & Employment Breakfast Roundtable
June 16, 2004

An Employer's Guide to Taking Advantage of the New FLSA Overtime Rules
Waukesha Labor & Employment Breakfast Roundtable
June 15, 2004

Labor & Employment Breakfast Roundtable
March 17, 2004

Labor & Employment Breakfast Roundtable
March 16, 2004

Education

Juris Doctor, University of Minnesota Law School, *magna cum laude*, Order of the Coif
Bachelor of Arts, Cornell University, with distinction
Master's Degree, University of Wisconsin-Madison, Journalism/Mass Communications

Practice Areas

Business

- Labor, Employment & Immigration

Litigation

- Labor & Employment Litigation

Milwaukee

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MARGARET R. KURLINSKI

Meg Kurlinski is an associate member of Godfrey & Kahn's Labor and Employment Practice Group. Meg assists clients with a variety of labor and employment matters, including the management of day-to-day employment matters, drafting and enforcing restrictive covenant agreements, administering family and medical leave laws, litigating federal and state discrimination claims, conducting unlawful harassment investigations, and drafting affirmative action plans.

Meg also counsels clients regarding the employment and labor matters that are related to business sales, mergers and acquisitions, and other corporate restructuring, including employment and labor due diligence, employee selection and retention, employment agreements, and reduction-in-force issues. In addition, Meg counsels employers on international employment and business issues.

Meg regularly conducts workshops and seminars on employment law topics for clients and other employment law professionals.

Meg received her law degree from Washington University School of Law with honors. While at Washington University, Meg was a staff editor for Washington University Global Studies Law Review. She received her Bachelor of Arts in Philosophy, cum laude, from Truman State University.

Admissions & Activities

Admitted to Practice

Wisconsin – 2005

Professional Association Memberships

Association for Women Lawyers
State Bar of Wisconsin

Activities

Godfrey & Kahn Summer Associate Committee
United Way Emerging Leaders - Board Member
Marquette Legal Clinic - Volunteer

News, Updates & Events

News & Publications

Meg Kurlinski authored "Proposed changes to FMLA regulations, public comment period ends April 30" (InsideTrack)
April 18, 2012

Meg Kurlinski authored "Federal Vs. Wisconsin Family And Medical Leave Laws" (Law360)
July 29, 2011

Meg Kurlinski authored "Federal Vs. Wisconsin Family And Medical Leave Laws" (Law 360)
July 29, 2011

Meg Kurlinski authors "Employers beware of Family and Medical Leave Act" (BizTimes)
July 06, 2011

Meg Kurlinski authored "Federal and Wisconsin family and medical leave: Five tips to identify differences" (Inside Track)
May 04, 2011

John Kalter, Todd Cleary and Meg Kurlinksi quoted in "Labor and Employment Law: Be Aware" (Wisconsin Community Banking News)
April 01, 2011

Labor & Employment Vantage Point
February 23, 2011

Meg Kurlinski was quoted in "EEOC regulations may spur more ADA suits" (Wisconsin Law Journal)
October 12, 2009

Employers need to adjust to state's expanded Family & Medical Leave Act
August 06, 2009

Adam Briggs, Daniel Finerty and Margaret Kurlinski authored a client update entitled "Government contracting reforms continue federal push for increased regulation, penalties" (wisbusiness.com)
June 09, 2009

Christine Liu McLaughlin and Margaret Kurlinski authored "Counseling clients in a potential swine flu outbreak" (Wisconsin Bar InsideTrack)
May 06, 2009

Counseling clients regarding a potential swine flu outbreak
May 06, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008

Godfrey & Kahn Updates

The Final ADAAA Regulations Are Out - Now What?
April 21, 2011

OFCCP Scrutiny of Hospitals and Other Health Care Entities Likely
November 03, 2010

Labor & Employment Vantage Point
August 10, 2010

Labor & Employment Vantage Point
December 02, 2009

Wisconsin Family and Medical Leave is Now Available for the Care of Domestic Partners
July 20, 2009

Economic Recovery Alert
May 29, 2009

Preparing for a Potential Swine Flu Outbreak
April 30, 2009

Revisions to the FMLA Regulations Will Change How Employers Administer Leave
December 01, 2008

China Adopts New Labor Contract Law
September 12, 2007

Attraction and Retention of Chinese Employees: A Legal Perspective
May 22, 2007

What Every Employer Needs to Know About the New EEO-1 Forms and Regulations
February 07, 2007
OFCCP: A Year in Review
November 28, 2006

Supreme Court Decision Further Defines Compensable Activity Under FLSA
November 16, 2005

Compensation Analysis Piques Interest
November 16, 2005

OFCCP News: Final Rule on Definition of Internet Job Applicant Has Broad Implications
November 15, 2005

Events

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

Administering the Family and Medical Leave Act Under the Current Regulations in Wisconsin
December 09, 2011

So You Are a TRICARE Provider? What's Next? Your Affirmative Action Plan and OFCCP Enforcement
July 28, 2011

Managing Employees on FMLA Leave
February 17, 2011

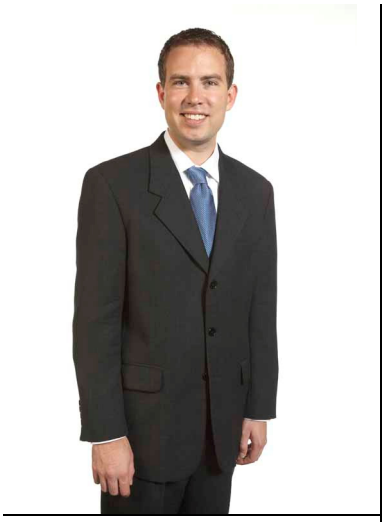
Managing the Electronic Workplace: E-discovery & Record Retention
October 15, 2008

Managing the Electronic Workplace: E-discovery & Record Retention
April 08, 2008

FMLA & WFMLA: Curing Leave Confusion, The H.S. Group
March 05, 2008

Education

Juris Doctor, Washington University School of Law, with honors
Bachelor of Arts, Truman State University, *cum laude*, Philosophy



Practice Areas

Business

- Labor, Employment & Immigration
- Health Care

Milwaukee

780 North Water Street
Milwaukee, WI 53202-3590
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FAX · 414.273.5198
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M. SCOTT LEBLANC

Scott LeBlanc is a member of the firm's Labor, Employment & Immigration and Health Care Practice Groups. Scott advises clients on a wide variety of labor and employment issues, including confidentiality, non-competition and non-solicitation agreements, employment discrimination, wage and hour claims, and family and medical leave administration. Scott also assists clients with drafting and enforcing employment and severance agreements. Scott's health care practice includes advising clients on compliance issues related to Medicare and Medicaid regulations, the Health Insurance Portability and Accountability Act (HIPAA), the Physician Self-Referral (Stark) Law, and the Anti-Kickback Statute.

During law school, Scott was an Executive Editor of the Duke Journal of Constitutional Law and Public Policy, a Staff Editor for the Duke Environmental Law and Policy Forum, and worked as a litigation intern at Southeast Louisiana Legal Services, a public interest law organization in New Orleans, Louisiana.

Prior to attending law school, Scott worked as a news producer and reporter for CBS and FOX affiliate television stations in Cedar Rapids and Des Moines, Iowa.

Admissions & Activities

Admitted to Practice

Wisconsin - 2011

Court Admissions

United States District Court, Eastern District of Wisconsin
United States District Court, Western District of Wisconsin

Professional Association Memberships

American Bar Association
State Bar of Wisconsin
Society for Human Resource Management (SHRM)
American Health Lawyers Association (AHLA)
Milwaukee Bar Association
Milwaukee Young Lawyers Association

News, Updates & Events

News & Publications

Scott LeBlanc & Rufino Gaytán mentioned in "Wisconsin Broadcasters Association Hosts Social Media Seminar" (radioworld.com)
December 20, 2012

Skeletons in the Closet? Minimizing the Risks of Background Checking
September 04, 2012

Dustin Brown, Martina Gast, Laura Hawkins, Travis Laird, M. Scott LeBlanc, Daniel Narvey, Aaron Seligman, Timothy Smith featured in New Faces, New Places (Milwaukee Journal Sentinel)
November 07, 2011

New Incentive Compensation Guidance from Regulators: What it Means for Community Banks
November 01, 2010

American Needle, Inc. v. NFL: Professional Sports Leagues and "Single-Entity" Antitrust Exemption
March 16, 2010

Events

Wisconsin Broadcasters Association - Discrimination Law for Broadcasters
June 20, 2012

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

Education

Juris Doctor, Duke University School of Law, *cum laude*
Bachelor of Science, Northwestern University, Journalism and Political Science

Practice Areas

Litigation

- Labor, Employment & Immigration

Milwaukee

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Milwaukee, WI 53202-3590
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REBECA M. LÓPEZ

Rebeca López is an associate in the Labor, Employment & Immigration Practice Group in the Milwaukee office.

While in law school, Rebeca clerked at the United States Federal District Court for Judge Lynn S. Adelman and she volunteered with the Marquette Volunteer Legal Clinic, assisting with legal research and Spanish to English translations for area attorneys.

Prior to law school, Rebeca was a Regional Coordinator and an Office Manager for U.S. Senator Russ Feingold in his Milwaukee District Office where she managed immigration casework, handled constituent services and coordinated outreach efforts in Southeastern Wisconsin.

Admissions & Activities

Admitted to Practice

Wisconsin - 2012

Court Admissions

United States District Court, Eastern District of Wisconsin

Professional Association Memberships

American Bar Association
State Bar of Wisconsin
Eastern District of Wisconsin Bar Association
Wisconsin Hispanic Lawyers Association

Activities

United Community Center, Education Committee, Member
United Way of Wisconsin, Teen Pregnancy Prevention Committee, Member

Honors

Recipient of several CALI Excellence for the Future Awards

News, Updates & Events

News & Publications

Thomas Bausch, Nina Beck, Kerry Gabrielson, Rebeca Lopez, Michael Mather, Shannon Pitsch, Robert Shepard, Danny Tang, Jennifer Vandermeuse and Adam Ziebell mentioned in "Personnel File" (BizTimes) January 21, 2013

Thomas Bausch, Nina Beck, Kerry Gabrielson, Rebecca Lopez, Michael Mather, Shannon Pitsch, Robert Shepard, Danny Tang, Jennifer Vandermeuse and Adam Ziebell mentioned in "People on the Move" (The Milwaukee Business Journal)
January 04, 2013

Thomas Bausch, Nina Beck, Kerry Gabrielson, Rebecca Lopez, Michael Mather, Shannon Pitsch, Robert Shepard, Danny Tang, Jennifer Vandermeuse and Adam Ziebell mentioned in "Who's Doing What: Godfrey & Kahn adds 10 associates" (Wisconsin Law Journal)
January 03, 2013

Thomas Bausch, Nina Beck, Kerry Gabrielson, Rebecca Lopez, Michael Mather, Shannon Pitsch, Robert Shepard, Danny Tang, Jennifer Vandermeuse and Adam Ziebell mentioned in "New Faces, New Places" (Milwaukee Journal Sentinel)
December 28, 2012

Rebeca López authored, "Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody" (Marquette Law Review)
July 01, 2012

Godfrey & Kahn Updates

Mexican Federal Labor Law Reform: Opportunities and Challenges for Employers with Operations in México
December 11, 2012

Education

Juris Doctor, *magna cum laude,* Marquette University Law School (Business Editor, *Marquette University Law Review*), 2012

Bachelor of Arts, Marquette University, International Affairs, Spanish Language and Literature

Practice Areas

Business

- Labor, Employment & Immigration

Milwaukee

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CHRISTINE LIU MCLAUGHLIN

Christine Liu McLaughlin is a shareholder in the Labor & Employment Law Practice Group in the Milwaukee office and is chair of the firm's Women's Leadership Forum and chair of the Diversity Committee.

Christine provides counsel on a wide variety of employment and labor issues ranging from interpretation and application of federal and state employment laws to specialized employee transition matters in complex business transactions.

Christine advises her clients on general employee hiring, discipline and termination issues; family and medical leave issues; federal and state disability discrimination issues; federal and state civil rights and fair employment issues; sexual and other unlawful harassment issues; workplace violence issues; and contingent workforce issues. Christine routinely defends discrimination claims that have been filed with the State of Wisconsin Equal Rights Division and the Equal Employment Opportunity Commission. Christine also has extensive experience in evaluating and drafting federal and Wisconsin state affirmative action plans, as well as advising on compliance reviews.

In addition to providing general employment advice, Christine advises on corporate employment issues. She routinely drafts and reviews restrictive covenant agreements, including noncompete agreements, confidentiality agreements, as well as employment agreements. Christine also assists corporate counsel in analyzing, preparing and implementing employee transition plans related to complex business transactions. This includes employment due diligence; representations and warranties; business reorganization; facility closings and mass lay-offs; and severance agreements. Christine also advises on employment, contract and business entry issues relating to China.

Christine has conducted workshops and seminars on various employment law topics in Wisconsin as well as nationally. She was instrumental in the creation and implementation of Legal Resource Training, Godfrey & Kahn's interactive training service initiated as a proactive tool to help clients avoid employment litigation.

Christine was previously in-house counsel and Director of Employee Relations for the world's leading staffing service. Prior to her in-house experience, Christine was in private practice in Iowa where she focused on litigation with an emphasis on labor and employment.

Admissions & Activities

Admitted to Practice
Iowa - 1992
Wisconsin - 1992

Professional Association Memberships
American Bar Association
Association for Women Lawyers
Human Resource Management Association of Southeastern Wisconsin (HRMA)
Milwaukee Bar Association
Milwaukee Women inc.
National Association for Professional Women
Society for Human Resource Management
State Bar of Wisconsin
TEMPO Milwaukee
The Fellows of the Wisconsin Law Foundation

Activities
United Way of Greater Milwaukee, Women's Initiative Leadership Council
Barristers Club, Member
The Management Association, Inc. (MRA), Senior Attorney Roundtable Member
COA Youth & Family Center, Board Member
Godfrey & Kahn, Executive Board Member
Godfrey & Kahn, Women's Leadership Forum Chair
Godfrey & Kahn, Diversity Committee Chair

Honors
Named 2013 “Up & Coming Lawyer of the Year” for Employment by *Chambers USA: America’s Leading Lawyers for Business*
Named a 2012 Woman of Influence by *The Business Journal of Milwaukee*
Listed in *The Best Lawyers in America* (Labor and Employment Law, 2012 - 2013)
Honored among the 2011 Women in the Law by *Wisconsin Law Journal*
Recognized by *Chambers USA: America’s Leading Lawyers for Busines*s (Employment Law, 2011 - 2012)
AV Rated - Martindale Hubbell

News, Updates & Events

News & Publications
Christine Liu McLaughlin named 2013 'Up & Coming Lawyer of the Year' for Employment by Chambers USA: America's Leading Lawyers for Business.
January 15, 2013

Christine Liu McLaughlin Named "Woman of the Year" by the National Association of Professional Women (NAPW)
September 17, 2012

Christine McLaughlin and Rufino Gaytan authored "NLRB says requesting confidentiality during internal investigations violates Section 7 rights" (InsideCounsel)
August 13, 2012

Christine McLaughlin and Rufino Gaytan authored "Arbitration agreements and class action waivers legal under NLRA" (InsideCounsel)
July 30, 2012

Christine McLaughlin and Rufino Gaytan authored "The 3rd Circuit adopts a joint employer test to determine FLSA liability" (InsideCounsel)
July 16, 2012

Christine McLaughlin and Rufino Gaytan authored "Supreme Court rejects the DOL's outside sales exemption interpretation" (InsideCounsel)
July 02, 2012

Christine McLaughlin and Rufino Gaytan authored "Running a union-free workplace doesn't make you safe from NLRB meddling" (InsideCounsel)
June 18, 2012

Christine Liu McLaughlin recognized as a 2012 Women of Influence in the Inspiration category by the Business Journal of Milwaukee
June 15, 2012

Christine McLaughlin and Rufino Gaytan authored "Labor: When employees are eligible for multiple FLSA overtime exemptions" (InsideCounsel)
June 04, 2012

Christine Liu McLaughlin featured in "Gone Fly Fishing - The Good Life" (BizTimes)
April 30, 2012

Christine Liu Mclaughlin named 2012 Women of Influence (Business Journal of Milwaukee)
April 26, 2012

Retaliation claims against employers soar
February 16, 2012

Christine McLaughlin quoted in "Bias complaint sends firm on long road to court" (Milwaukee Journal Sentinel)
June 27, 2011

Christine Liu McLaughlin featured in "McLaughlin demonstrates successful balance of work and family" (Wisconsin Law Journal)
June 23, 2011

Godfrey & Kahn Attorneys & Practice Groups Achieve Top Rankings in State (Chambers & Partners)
June 15, 2011

Christine Liu McLaughlin quoted in "Competition for Talent Rising in China's High-Tech Industry" (Society for Human Resource Management - SHRM)
November 05, 2010

Christine Liu McLaughlin and Margaret Kurlinski authored "Counseling clients in a potential swine flu outbreak" (Wisconsin Bar InsideTrack)
May 06, 2009

Counseling clients regarding a potential swine flu outbreak
May 06, 2009

Christine Liu McLaughlin was quoted in "Graduation may not lead to 'hire' education" (Wisconsin Law Journal)
March 30, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Face-off: Online Social Networking Sites and the Law
September 08, 2008

Genetic Information Non-Discrimination Act
May 23, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008

Mark Witt, Christine Liu McLaughlin, and Robert Irish were mentioned in the Opportunity Asia section article "Intellectual Property Protection Looms Big For U.S. Companies" (Business Journal)
October 26, 2007

Employee Recruitment in China is Challenging
August 17, 2007

Can We Use Gender in Our Hiring Decisions? The Discrimination Bona Fide Occupational Qualification (BFOQ) Applied to Health Care
March 13, 2007

China's Labor Law Changes Will Have Big Impact
January 19, 2007

Federal Affirmative Action Obligations of Banks
January 01, 2007

Godfrey & Kahn Updates

Mexican Federal Labor Law Reform: Opportunities and Challenges for Employers with Operations in México
December 11, 2012

OFCCP Scrutiny of Hospitals and Other Health Care Entities Likely
November 03, 2010

Labor & Employment Vantage Point
August 10, 2010

Labor & Employment Vantage Point
December 02, 2009

Preparing for a Potential Swine Flu Outbreak
April 30, 2009

China Adopts New Labor Contract Law
September 12, 2007

Attraction and Retention of Chinese Employees: A Legal Perspective
May 22, 2007

Major Labor Law Changes Will Impact Employers in China
November 28, 2006

California Mandates Sexual Harassment Training
March 2005

Events

2012 Godfrey & Kahn Labor & Employment Seminars
March 20, 2012

Retaliation: Just When You Thought You Were Out of the Woods
February 23, 2012

2011 Godfrey & Kahn Corporate Counsel Symposium
November 10, 2011

So You Are a TRICARE Provider? What's Next? Your Affirmative Action Plan and OFCCP Enforcement
July 28, 2011

2011 Godfrey & Kahn Labor & Employment Seminars
March 15, 2011

2009 Godfrey & Kahn Corporate Counsel Symposium
November 10, 2009

Handling Agreements: Offer Letters, Severance Agreements and Settlement Agreements
April 28, 2008

Surviving Immigration Reform
September 20, 2006

Keeping Pace with an Aging Workforce: Legal Issues Related to Recruitment, Retention and Accommodation of Older Employees
September 21, 2005

Quirky Questions: Case Studies Highlighting Common Human Resources Issues and Their Solutions
Milwaukee Labor & Employment Breakfast Roundtable
June 15, 2005

The Successful Termination: How To Terminate So You Don't Have To Litigate
Milwaukee Labor & Employment Breakfast Roundtable
February 16, 2005

Education

Juris Doctor, Marquette University Law School
Bachelor of Arts, Marquette University, 1989, College of Communications

Practice Areas

Business

- General Corporate
- Labor, Employment & Immigration

Appleton

100 West Lawrence
Appleton, WI 54912-2728
TEL · 920.831.6362
FAX · 920.830.3530
EMAIL · jprosser@gklaw.com

JAMES T. PROSSER

James T. Prosser is a member of the Corporate Practice Group in the Firm's Appleton office. In addition, he works with the Labor, Employment & Immigration Practice Group.

Jim's corporate practice includes assisting businesses with organizational issues, corporate governance, contractual relations and advice on general corporate matters. Jim assists employers on compliance with federal, state and local employment laws and regulations, developing employment policies and procedures, drafting of employment contracts, restrictive covenants and separation agreements, and responding to employment related claims.

Prior to joining the Firm, Jim served as General Counsel, Corporate Secretary and Chief Administrative Officer of Jewelers Mutual Insurance Company in Neenah, Wisconsin, an insurer of retail, wholesale and manufacturing jewelers in all 50 states. Jim was responsible for all legal issues relating to the company as well as supervision of multiple departments including claims, information technology, human resources and finance. He was also involved in the company's budgeting, strategic planning and overall leadership.

Before working at Jewelers Mutual, Jim was in private practice in the Fox Valley area for nearly 14 years.

Jim's prior experience advising businesses in private practice and his time spent assisting in managing a nationwide company allow him to bring to clients a valuable understanding of the day-to-day issues facing businesses. His background and expertise enable him to balance the legal risks of his clients with their desired business goals and objectives.

Jim received his law degree from the University of Wisconsin - Madison and a bachelor's degree in history from the University of Wisconsin - Whitewater.

Admissions & Activities

Admitted to Practice

Wisconsin - 1986

Professional Association Memberships

American Bar Association
State Bar of Wisconsin
Winnebago County Bar Association

Activities
ThedaClark Medical Center - Former Director and Chair, Grants Committee
Appleton Convention Center Community Coalition
Neenah Police Commission - President

News, Updates & Events

Godfrey & Kahn Updates
Labor & Employment Vantage Point
August 10, 2010

Labor & Employment Vantage Point
December 02, 2009

Events
2012 Labor & Employment Seminars
March 20, 2012

Education
Juris Doctor, University of Wisconsin Law School
Bachelor of Arts, University of Wisconsin-Whitewater, History

Practice Areas

Business

- Labor, Employment & Immigration

Madison

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Suite 500
P.O. Box 2719
Madison, WI 53701-2719
TEL · 608.284.2624
FAX · 608.257.0609
EMAIL · msantamaria@gklaw.com

MONICA SANTA MARIA

Monica Santa Maria joined Godfrey & Kahn in 2008 and is an associate member of the Litigation Practice Group in the Firm's Madison office. In addition to working on general civil litigation projects, Monica will also be working with two other practice groups: White Collar Defense and Investigations; and Labor and Employment (with an immigration law focus).

Monica graduated from the University of Wisconsin Law School in 2008 with a Criminal Law Concentration. As part of her course-work for the Concentration, Monica interned at the Madison office of the Federal Defender Services of Wisconsin, Inc. and was a student attorney in the Criminal Appeals Project of the Frank J. Remington Center. She additionally volunteered her time with the Unemployment Appeals Clinic and served as an Articles Editor for the Wisconsin Law Review. Immediately before beginning law school, Monica worked as a Spanish-English medical interpreter in various clinics and hospitals in the greater Madison area. Monica received her Bachelor's Degree from Princeton University and additionally holds a Master of Science in Linguistics Degree from M.I.T.

Admissions and Activities

Admitted to Practice

Wisconsin - 2008

Court Admissions

State of Wisconsin
United States Court of Appeals, Seventh Circuit
United States District Court, Western District of Wisconsin

Professional Association Memberships

State Bar of Wisconsin

News, Updates and Events

News & Publications

The Changing Landscape of Employment Eligibility Verification: The Electronic Employment Verification System
January 28, 2010

Rebecca Hamrin, Adam Loomans, Wendy Richards, Eric Weiss, Claire Finando, Monica Santa Maria, Andrew Turner, and Annie Raupp were mentioned in "New Faces, New Places" (Milwaukee Journal Sentinel)
October 20, 2008

Milwaukee's Godfrey & Kahn adds 10 (The National Law Journal)
October 07, 2008

Education

Juris Doctor, University of Wisconsin Law School, 2008, *cum laude* and Order of the Coif
Master of Science, Massachusetts Institute of Technology, 1998
Bachelor of Arts, Princeton University, 1995

Practice Areas

Business

- Labor, Employment & Immigration
- General Corporate

Madison

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Suite 500
P.O. Box 2719
Madison, WI 53701-2719
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FAX · 608.257.0609
EMAIL · gschaeffer@gklaw.com

GENE T. SCHAEFFER, JR.

Gene Schaeffer is a member of the Labor & Employment Practice Group in the Madison office. He concentrates his practice primarily in immigration law and employment law.

As a member of the Immigration team, Gene works with many firm clients on a variety of immigration-related business and employment issues, including advising on appropriate temporary and permanent visa processing for alien employees. Gene has also advised clients on employment issues related to I-9 compliance, I-9 audits and social security.

Admissions & Activities

Admitted to Practice
Wisconsin - 1992

News, Updates & Events

News & Publications

The Changing Landscape of Employment Eligibility Verification: The Electronic Employment Verification System
January 28, 2010

Gene Schaeffer was quoted in "Lawyers: E-Verify increasingly unavoidable" (Wisconsin Law Journal)
September 23, 2009

Jennifer Hannon, Lecia Johnson, Jonathan Ingrisano, Gene Schaeffer, and Daniel Finerty were mentioned in "In the News" (Wisconsin Lawyer)
March 01, 2009

Lecia Johnson, Jennifer Hannon, Jonathan Ingrisano and Gene Schaeffer were mentioned in "People on the Move" (The Business Journal of Milwaukee)
February 06, 2009

Lecia Johnson, Jennifer Hannon, Jonathan Ingrisano and Gene Schaeffer were mentioned in "New Faces, New Places" (Milwaukee Journal Sentinel)
January 18, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Gene Schaeffer was quoted in "Pastor, Wife Struggle With Obtaining Green Cards Before Deadline" (WISC-TV Channel 3000)
March 26, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008

Health Care Employers of H-1B Aliens Must Notify Government of Terminations
March 13, 2007

Gene Schaeffer was quoted in, "Wisconsin's Immigrants: From Cheese Factory Workers to CTOs." (InBusiness Magazine)
September 12, 2006

Godfrey & Kahn Updates

Worksite Enforcement Update
July 29, 2009

New No-Match Rule Enacted
November 20, 2008

Revised I-9 Form Introduced by USCIS Goes Into Effect December 26, 2007
November 28, 2007

Immigration Law Update
September 13, 2007

Final Rule Issued by Department of Labor Affects Alien Labor Certification Process
May 30, 2007

Immigration Law Changes are a Mixed Bag for U.S. Employers
March 16, 2005

Telemarketing (Do Not Call List) Issue Leave Many People on Hold
January 01, 2003

Education

Juris Doctor, University of Wisconsin Law School, with honors
Bachelor of Science, Pennsylvania State University, 1989, Administration of Justice, with high distinction

Practice Areas

Business

- Health Care
- Labor, Employment & Immigration

Madison

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Madison, WI 53701-2719
TEL · 608.284.2239
FAX · 608.257.0609
EMAIL · tshorter@gklaw.com

THOMAS N. SHORTER

Thomas N. Shorter is a shareholder in the firm's Madison office and Chair of the Health Care Team. Tom represents hospitals, physicians' groups, research institutions and health care related organizations, as well as other businesses, providing counsel on health care, corporate, labor and employment and regulatory matters. For clients in the health care industry, Tom handles matters regarding Medicare compliance, Health Insurance Portability and Accountability Act (HIPAA), Emergency Medical Treatment and Labor Act (EMTALA), Physician Self-Referral (Stark), and Anti-Kickback. Additionally, Tom is also called upon by other organizations to handle management-side legal corporate and employment issues, including the Family and Medical Leave Act (FMLA), Fair Labor Standards Act (FLSA) compliance, Individuals with Disabilities Education Act (IDEA), Section 504, and Americans with Disabilities Act (ADA).

Admissions and Activities

Admitted to Practice

Minnesota
Wisconsin

Court Admissions

United States Court of Appeals, Seventh Circuit
United States District Court, Eastern District of Wisconsin
United States District Court, Western District of Wisconsin

Professional Association Memberships

American College of Healthcare Executives
American Health Lawyers Association
American Society for Healthcare Human Resources Administration (ASHHRA)
HIPAA Collaborative of Wisconsin
Health Care Compliance Association
Minnesota State Bar Association
NSBA Council of School Attorneys
Society for Human Resource Management
State Bar of Wisconsin
Wisconsin School Attorneys Association

Activities

HIPAA Collaborative of Wisconsin, Board of Directors
American Health Lawyers Association, Chair of Labor & Employment Practice Group

State Bar of Wisconsin, YLD Board of Directors 2001-2002; Health Law Section Board of Directors 2009-Present; Chair of the Health Law Section 2012
Independent Living, Inc., Board of Directors
City of Fitchburg Board of Review
Leadership Greater Madison (LGM 12)
CIVITAS
Wisconsin School Attorneys Association (President 2006-2007)
United States Coast Guard Reserve (1991-1999)

Honors

Selected as one of "40 Under 40" by *In Business Magazine* in 2006
Listed in *The Best Lawyers in America* (Education & Health Law, 2007-2013; Lawyer of the Year, Education Law, 2012; Lawyer of the Year, Health Care Law, 2013)
Listed in *Who's Who in American Law*
Madison Magazine Top Lawyers (Education & Health Law, 2007-2009)

News, Updates and Events

News & Publications

Thomas Shorter was mentioned in "People on the Move" (The Milwaukee Business Journal)
February 01, 2013

Thomas Shorter and C. Wade Harrison co-authored "The Wage and Hour Headache: Searching for a Cure" (American Health Lawyers Association Connections)
November 09, 2012

Concealed Carry: Best Practices After November 1, 2011
December 01, 2011

Thomas Shorter featured in "Movers" (Corporate Report Magazine)
June 01, 2011

Thomas Shorter featured in "Personnel File" for his reappointment as chair of the American Health Lawyers Association's Labor and Employment Practice Group. (BizTimes)
May 27, 2011

Thomas Shorter was mentioned for his appointment to chair of the American Health Lawyers Association labor and employment practice group (Wisconsin Lawyer)
July 20, 2010

Thomas Shorter was mentioned as being appointed chair of the American Health Lawyers Association's Labor and Employment Practice Group (Health Leaders Media)
June 07, 2010

Thomas Shorter was mentioned as being appointed Chair of the American Health Lawyers Association's Labor and Employment Practice Group in "Who's Doing What?" (Wisconsin Law Journal)
June 04, 2010

Tom Shorter was mentioned in "movers" (Corporate Report)
September 01, 2009

John Haase, Daniel Finerty and Thomas Shorter authored "New S.B. 20 Authorizes Circuit Courts to Award Compensatory and Punitive Damages" (State Bar of Wisconsin)
June 17, 2009

Recovery Audit Contractors are Coming: Are You Prepared?
April 20, 2009

Thomas Shorter was mentioned in "Profit Success Using LinkedIn - Actions You can Replicate" (Capture Business Profits Blog)
January 28, 2009

Thomas Shorter, Brady Williamson and Michael Wittenwyler were listed in "The Verdict: Top Lawyers" (Madison Magazine)
January 01, 2009

Labor & Employment Vantage Point - Fall 2008
November 03, 2008

Tom Shorter was mentioned in "Attorneys are getting LinkedIn to clients online" (Wisconsin Law Journal)
September 23, 2008

Genetic Information Non-Discrimination Act
May 23, 2008

The New Electronic Discovery Rules: What they mean for healthcare providers
March 24, 2008

Labor and Employment Law Vantage Point - Winter 2007/2008
February 08, 2008
On the Move: Serving Intrastate and Interstate Transfer Students Under the IDEA
May 07, 2007

Can We Use Gender in Our Hiring Decisions? The Discrimination Bona Fide Occupational Qualification (BFOQ) Applied to Health Care
March 13, 2007

Complying with the Deficit Reduction Act: Questions and Answers About Employee Education Requirements
December 06, 2006

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