



HR TAMPA EMPLOYMENT LAW WEBINAR

WELCOME

Headwinds On The Horizon
Don't Get Blown Away By New
Developments In Workplace Law

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Regulations Affecting Transgender Employees



What Does This Mean For Employers?

Examples of issues we are seeing:

- Persons who want to use the restroom of the gender with which they identify
- Persons who want to dress in the gender with which they identify
- Persons going through chemical and/or surgical procedures to change gender
- Persons who want to be called by the name or pronoun of their self-identification
- Persons who want to compete or participate in events that are associated with the gender with which they identify
- An accommodated employee may be subject to bullying, hazing, harassment, or isolation at work, requiring the intervention of the employer



So, What Do You Do?

When faced with a request to accommodate a transgender employee, what are the options for approaching the issue?





HYPOTHETICAL: Male employee tells you he is transitioning to a female but does not intend to undergo surgical modification:

- Can you request medical documentation or “proof” or ask about future procedures?
- Can you require the employee to continue using the male restroom?
- Can you require the employee to comply with your gender-specific dress code or grooming policies?
- How will co-workers react? How should you inform them?
- How will your customers/clients feel about this?



Requesting Proof

- Do **not** require medical documentation or “proof” of transgender status
 - No legal support for these requests
 - Do not require full transition before accommodating



Which Way to the Restroom?





Which Way to the Restroom?

- April 2015: EEOC ruled that U.S. Army discriminated against transgender woman by refusing use of women's restroom
- May 2015: OSHA requires employers to provide “meaningful” access to workplace restrooms, including for transgender employees
- Spring 2016: North Carolina and Mississippi regulations regarding bathrooms stir national concern



Which Way to the Restroom?

- July 2016: Massachusetts enacts transgender accommodation law to permit transgender persons to use restrooms, changing rooms, and locker rooms that match their gender identity
- August 2016: Federal Judge in Texas deals blow to Obama administration's transgender school bathroom directive
- September 2016: California enacts law requiring all single-occupancy restrooms to be identified as “all gender” and universally accessible



Restroom Takeaways

- Check for local laws and regulations
- Do **not** require transgender employees to use certain restrooms
- **Accommodate** – allow transitioning employees to use restroom of choice
- Suggest other, more private facilities if available:
 - But . . . Beware of OSHA
- Consider unisex/gender neutral designation:
 - Ex. Single-use, gender-neutral restrooms

Dressing the Part





Dressing the Part

- April 2015: Transgender man files suit against finance company in Louisiana alleging he was terminated after refusing to dress and be treated as a female:
 - Asked to sign document saying his dress “preference” did not comply with personnel policies
- April 2015: Transgender worker sues Forever 21 alleging harassment and discrimination after she began transition to a woman
- April 2015: Michigan court allows case to go forward--plaintiff alleges she was fired by funeral home after announcing transition to female and dressing in women’s business attire
- April 2015: Florida eye clinic settles for \$150,000--former employee allegedly harassed and terminated after she began to wear makeup and traditionally female clothing to work



Dressing the Part

- Employers have the right to enforce policies relating to employees' physical appearance and attire:
- Safety, professionalism/public image, productivity matter
- May be required to allow employees to dress consistent with gender identity
- **Do not** require adherence to male/female dress code
- Avoid gender stereotyping
- Accommodate during “transition” – determine which policies apply
- Be respectful of all views and positions on these subjects, and demonstrate compassion



The Americans with Disabilities Act

- ADA excludes transsexualism, transvestism, and gender identity disorders not resulting from physical impairment in definition of disability
- Not required to accommodate if condition not a disability impairment
- Medical information must be kept confidential
- Jan. 2015: lawsuit filed in PA challenging constitutionality of exclusion



Other Considerations

- Reaction from co-workers?
- Bullying?
- Disruption/productivity?
- Perceived customer bias?
 - Privacy concerns have generally been rejected by the courts
 - *Schroerer v. Billington* (D.D.C. 208): “Deference to the real or presumed biases of others is discrimination, no less than if the employer acts on behalf of his own prejudices.”
 - Religious objections have been uniformly rejected

LGBT Discrimination: Employer Best Practices





Best Practices

- **Awareness:** Be aware of all applicable state and local non-discrimination laws where business has operations
- **Compliance:** Ensure policies comply with all state and local laws and workplace non-discrimination objectives
- **Policies:** Consider developing more comprehensive policies
- **Understanding:** Demonstrate and model behaviors of compassion and respect
- **Consistency:** Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes
- Do not require medical documentation or “proof” of transgender status





Best Practices

- **Investigate:** Be alert to bullying and other unprofessional conduct, and discipline where necessary
- **Educate:** Train employees on policies and place appropriate emphasis on inclusive company culture
- **Accommodate** (where possible): Good will (even if not legally required) can go a long way
- Names/pronouns, accommodations, communicating to co-workers, etc.



New FLSA Overtime Rules



What's Going On?

- 2014 – President Obama charged the U.S. Labor Department with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act
- 2015 – The Department published its proposed changes and received numerous comments
- 2016 – The Department published revised definitions that will affect most employers in at least some way on *December 1, 2016*
- Management has only a matter of weeks to get into compliance



Four Main FLSA Requirements

1. A minimum wage (currently \$8.05 an hour in Florida)
2. Premium pay for overtime work (at a rate of 1.5 times the “regular rate” of pay for over 40 hours worked in a single workweek)
3. Certain recordkeeping, including accurate time records
4. Limitations on the employment of minors under 18



What Are “Exemptions”?

- “Exempt”: Not Subject to One or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rules affect most “white collar” exemptions from minimum-wage and overtime



“White Collar” Exemptions Affected

- Executive, Administrative, Professional
- Also “Computer Employees” “Highly Compensated” varieties
- Three general requirements for most of them:
 1. Paid on a “salary basis”
 2. Salary is at least a certain amount
 3. Employee performs specific kinds of work



What Is Changing?

- Effective December 1, 2016, minimum salary threshold will be \$913 per week (paid on a “salary basis”)
- Requirement still applies each pay period (not annualized)
- Effective December 1, 2016, total-annual-compensation threshold for “highly compensated employee” exemption will increase from \$100,000 to \$134,004
- Thresholds will be “updated” every three years, with 150 days’ notice



What Is Changing?

- Employers will be able to satisfy up to 10% of the salary threshold from “nondiscretionary bonuses and incentive payments,” including commissions
- Can count only those paid quarterly or more frequently
- Cannot do this as to the salaries of employees treated as exempt under the “highly compensated” exception



What Should You Do?

- Immediately evaluate exempt employees' current status, develop action plan
 - Continue to treat some or all as “white collar” exempt?
 - Treat as exempt on some other basis?
- Consider the FLSA alternatives



Are They **Really** Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses



Are They **Really** Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do



Are They **Really** Exempt?

- Job descriptions do not “make” employees exempt
- Current, accurate, well-written ones can:
 - Help management make a good decision
 - Play a role in defending exempt status
- Unrealistic, inaccurate, puffed-up, old, or poorly-written ones can:
 - Lead to an incorrect decision
 - Hurt defense efforts



Another Exemption?

- For example, is FLSA's Section 7(i) overtime exception an option?
 - Employee of a “retail or service establishment”, and
 - More than half of employee's compensation in a “representative period” comes from “commissions”, and
 - Regular hourly rate in an over-40-hours workweek is more than 1.5 times FLSA minimum wage



What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
 - Pay by-the-hour?
 - Pay a salary as straight-time compensation for 40 hours (or some other number)?
 - Pay a salary as straight-time compensation for all hours?
 - Pay on a commissions-plus-overtime basis?
 - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?



State and Local Laws

- Florida Minimum Wage Act/Amendment
 - Currently \$8.05 / hour
 - Adjusted each year based on rate of inflation
 - If no inflation, stays the same as prior year
- Miami-Dade & Broward County Wage Theft Ordinances



What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Publicity will cause all employees (exempt or not) to focus upon their pay (the 2004 changes did)
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all “contractors” . . . ?



Non-Compliance Consequences

- Back wages, plus equal amount (“liquidated damages”)
- Civil money penalties
- 2-year limitations period, 3 years if “willful”
- Court-ordered compliance in the future (possible “contempt of court” for later violations)



Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Adverse publicity



Helpful Resources

FLSA Exemption Review

Executive Exemption Worksheet


Date:			
Reviewer:			
Title and location reviewed:			
Salary per week of lowest-paid incumbent:			
Other types of compensation:			
Average annualized compensation:			
Section	Review	Response	
1.	Is each incumbent paid on a "salary basis" at a rate of at least \$913 a week?	Y	N
2.	What customarily recognized department(s) or subdivision(s) does each incumbent manage?		
3.	Does each incumbent engage in the following kinds of management identified below?		
3.a.	Interview, select, and train employees	Y	N
3.b.	Set and adjust employees' rates of pay	Y	N
3.c.	Set and adjust employees' hours of work	Y	N
3.d.	Direct the work of employees	Y	N
3.e.	Maintain records and use such records to manage, supervise, and control the unit's activities	Y	N



Helpful Resources

- <https://www.dol.gov/whd/overtime/final2016/>

U.S. Department of Labor
Wage and Hour Division



The Department announced a Final Rule focused primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. For more information, see <http://www.dol.gov/whd/overtime/final2016/>.

Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity

FS 17B

Some Closing Thoughts

- Don't fall for "conventional wisdom":
 - "**Everybody** treats this job as exempt."
 - "The employee **wants** to be exempt."
 - "The employee **agreed** to be exempt."
- Consider applicable state and local laws:
 - Might not have the same exemptions
 - Might define exemptions differently
 - Might affect pay-plan options or designs



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Background Checks and FCRA Compliance



EEOC *traditionally* focused on individual discrimination charges. . .but things are changing ...

EEOC Enforcement Focus



Systemic Discrimination

- In 2005, EEOC Chair established Systemic Discrimination Task Force and shifted the EEOC's emphasis to the investigation and litigation of *systemic discrimination*
- The EEOC has developed systemic discrimination plans for all 15 district offices
- “A strong systemic program is crucial to battling unlawful patterns or practices of discrimination which have a broad impact on an industry, profession, company, or geographic location.”



Eliminating Barriers

- Focus on class-based recruitment and hiring practices
- Systemic barriers which have disparate impact on protected groups
- EEOC will look closely at exclusionary policies or practices:
 - Dates of birth inquiries
 - Channeling of applicants into specific jobs
 - Screening tools – criminal and credit checks, pre-employment tests



Arrest and Conviction Records

- EEOC initiated an investigative strategy targeting pre-hire selection criteria that impacts minorities
- Some National data suggests that criminal background checks have disproportionate impact on minorities because they have higher conviction rates
- Pepsi reached a \$3 million settlement with EEOC for manner in which it was using criminal background checks to screen applicants



Criminal Background Checks

- EEOC believes that an employer's policy/practice of excluding individuals from employment because they have criminal conviction records is unlawful unless the exclusion is "job related and consistent with business necessity"



“Ban the Box” Movement

- Legislation limiting criminal background check information
- 14 states and nearly 100 cities have adopted ban the box for state hiring
- Many states and cities ban questions about prior convictions on applications for private employment





Complying with the EEOC Guidance

- Do not maintain a blanket “no conviction” policy
- Implement a policy for the consideration of conviction records that is “Job Related and Consistent with Business Necessity”
- Conduct an **“Individualized Assessment”** of applicants with criminal records



Job Related and Consistent with Business Necessity

- Employers must consider:
 - The nature and gravity of the offense or conduct, including:
 - Harm caused
 - Specific elements of the crime
 - Felony or misdemeanor
 - The time that has passed since the offense or conduct and/or completion of the sentence
 - The nature of the job held or sought



Individualized Assessment

- Give the applicant an opportunity to provide information:
 - The facts or circumstances surrounding the offense
 - The number of convictions
 - Age at the time of conviction, or release from prison
 - Evidence that the individual performed the same type of work, post conviction, with no known incidents of criminal conduct
 - The length and consistency of employment history before and after the offense or conduct
 - Rehabilitation efforts
 - Employment or character references
 - Whether the individual is bonded under a federal, state, or local bonding program



To Check or Not to Check?

- Consider limits on background checks:
 - After a conditional offer of employment is made
 - Checks for certain positions:
 - safety sensitive
 - position of trust
 - unsupervised access to property, customers, vulnerable members of the public



To Do

- Carefully review current policies and practices related to criminal background checks
- Do not adopt or maintain a blanket policy or practice where you will not hire anyone with a criminal record – felony or misdemeanor
- Confirm that applications have specific language that criminal history is not an absolute bar to employment
- Properly train individuals with hiring authority
- Consider conducting criminal background checks after extending contingent employment offers



To Do . . .

- Consider running criminal background checks on applicants for particular jobs
- Build into the policy procedures:
 - To make an individualized assessment
 - To have all no-hire decisions reviewed/approved by Human Resources and/or review committee
- Document the decision to not hire any applicant because of the applicant's criminal record



The Fair Credit Reporting Act (FCRA)

- FCRA lawsuits are the latest trend in employment litigation with many multi-million dollar settlements





The Fair Credit Reporting Act (FCRA)

- The FCRA applies to background checks if an employer uses a third party to verify:
 - Educational background
 - Job history
 - Criminal record
 - Credit history
 - Driving record
 - Other information



The Fair Credit Reporting Act (FCRA)

- In 2014, 827 FCRA lawsuits were filed and in 2015, over 2,000 FCRA lawsuits were filed
- In 2016, even more will be filed before year-end



Significant Financial Exposure

- FCRA penalties range from \$100 to \$1,000 per consumer report
- Attorney's fees can be catastrophic



Big Settlements Spur More Litigation

- Publix \$6.8 million (March 2014)
 - 90,000 potential class members
 - Single line FCRA release
- Food Lion \$3 million (March 2015)
 - No “stand-alone” disclosure
 - No pre-adverse action notice



Big Settlements Spur More Litigation

- Home Depot \$1.8 million (April 2014)
 - FCRA disclosure and release of liability on one form
- Chuck E. Cheese \$1.75 million (July 2015)
 - Checks to class members \$38 - \$63. Attorney's fees \$577,000



Before You Obtain a Consumer Report

- “Notice” or “disclosure and authorization” requirements
 - Written notification to applicant or employee that employer may obtain a consumer report for employment purposes
 - Obtain written consent to obtain the report
- Stand-alone document
 - Notice or disclosure must be “clear and conspicuous” and contained in a document that consists solely of it



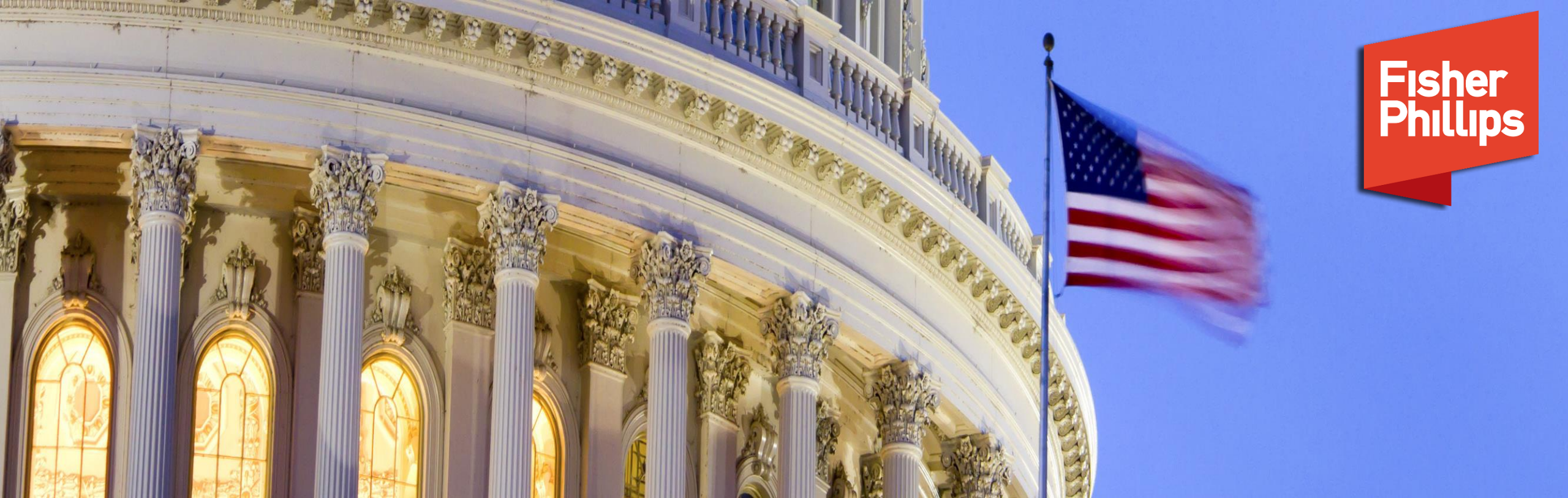
Before You Take Adverse Employment Action

- Provide a copy of the consumer report and State FCRA law to applicant or employee
- Provide “Summary of Rights Under The Fair Credit Reporting Act”
- Wait a “reasonable amount of time” before taking adverse action



After Taking Adverse Employment Action

- Provide notice of the adverse employment action
- If applicable, provide credit score disclosures
- Provide contact information for the consumer reporting agency and state that the agency did not make the adverse action decision and cannot provide specific reasons for it
- Advise of rights with respect to the consumer reporting agency
 - To obtain a free copy of the consumer report within 60 days
 - To dispute accuracy or completeness of the information in report



Hot Topics/ Regulatory Update



The NLRB

- Don't assume the NLRA doesn't apply to you!
- The NLRB has shown a huge interest in company handbooks and other policies, including policies regarding social media, confidentiality, trade marks, and communications
- The NLRB has also been blurring the franchisor/franchisee lines of responsibility with its joint employer doctrine



GINA

Title II of GINA prohibits employers from:

- Discriminating against employees, applicants, and former employees based on genetic information
- Deliberately acquiring genetic information
- Disclosing genetic information





The Case of the Devious Defecator

- The first GINA jury verdict came in 2015
- A jury awarded two workers **\$2.2 million** after their employer asked them to take a DNA swab test in order to determine who had been repeatedly defecating on warehouse property





Marijuana - It's Legal... sort of

- More states have legalized recreational use and possession
- Still a violation of federal and Florida law

SCENARIO: Employee goes skiing in Colorado or on vacation to Seattle. Smokes marijuana there legally. Returns to work in Florida and has an industrial accident after which he is subject to post accident testing.

Can you terminate?





SEC Cracks Down on Anti-Whistleblower Severance Agreements

- Part of Wall Street reformation effort
- Severance agreements cannot unduly limit workers from reporting possible whistleblower tips
- Rule says that employers cannot take any action to impede an individual from communicating directly with the SEC about a possible securities law violation
- August 2016—SEC levied two six-figure fines to different employers for violation of the new rule



EEOC Publishes New Retaliation Guidance in August 2016

- The guidance is not gospel, but is merely guidance
- The guidance covers retaliation under any law within the jurisdiction of the EEOC
- To be a protected whistleblower, an employee must have engaged in opposition to some practice in a reasonable manner and the employee must base the opposition on a good faith belief that the employer's conduct is or could become unlawful
- The definition of what is an adverse employment action is broad, not just demotions, suspensions, or terminations, but could include a poor evaluation or a forced transfer



EEOC Publishes New Retaliation Guidance in August 2016

- The EEOC issued its list of best practices which included:
 - a. Implementing a written anti-retaliation policy;
 - b. Training all supervisors on the policy;
 - c. Providing advice and individualized support for those who could be in a position to retaliate and those who could be victims of a retaliatory action;
 - d. Proactively following up after an employee has engaged in protected activity; and
 - e. Reviewing internal employment actions to ensure the EEOC guidance has not been violated.



Time to Update Workplace Posters

- DOL has issued new FLSA posters in advance of December 1
- DOL has also issued new Employee Polygraph Protection Act notice which was effective August 1
- New FMLA poster was published by DOL in April 2016



Final Questions

THANK YOU
FOR THIS OPPORTUNITY

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