
HR FLORIDA
CONFERENCE & EXPO
AUGUST 27-29, 2018
GAYLORD PALMS RESORT & CONVENTION CENTER
KISSIMMEE, FLORIDA
Celebrating 40 years
SINCE 1977
HR FLORIDA STATE COUNCIL
AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT
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Managing Your Workforce
Presented By: Brett Owens and Lisa McGlynn
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MEDICAL MARIJUANA

Understand Your State Marijuana Laws

- It is important that you understand your rights and obligations—and those of your employees—under any state-specific marijuana laws in place where you do business. Each state has different requirements, and by keeping yourself up to date on the constantly changing laws, you can avoid surprises down the line.

Florida Law

Amendment 2 to the Florida Constitution allows qualified physicians to issue a physician certification for the medical use of marijuana to individuals with debilitating medical conditions. § 381.896, Fla. Stat. Employers are not required to accommodate an employee's use of medical marijuana at work and the statute expressly denies the creation of "a cause of action against an employer for wrongful discharge or termination." Medical marijuana users are prohibited from using medical marijuana at their place of employment without their employer's permission. For employers with drug-free policies and programs, "this section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy."

Florida Law

- A Florida company, to maintain compliance with federal law, can prohibit its employees from using medical marijuana on and off the worksite by arguing:
  - That federal law, under the controlled substances act, preempts state law;
  - That the language of the florida marijuana statute expressly prohibits on-site use; and
  - That the lack of language regarding off-site use of medical marijuana is different than the states that have allowed off-site use and discrimination claims against employers because florida law denies a cause of action against an employer for wrongful discharge or termination based on medical marijuana use.

Drug Testing

- Have a written policy in place
- Have a written procedure in place
- Meet with/interview suspected employee
- Document reasonable suspicion indicators
- Arrange for transportation to and from testing facility (and, if necessary, home)
- Be consistent with procedure
- Be consistent with discipline
- Maintain confidentiality as reasonably appropriate

Policies

- Include information addressing how you treat marijuana use as part of an updated, comprehensive substance abuse and testing policy
- Consider whether use poses a threat to workplace safety and identify areas/positions of high risk
- Notify applicants and current employees of the policy
- Tailor policies to adhere to differing state requirements
- Ensure managers are aware of policies
- Maintain uniformity in policy enforcement and discipline
- Adopt measures for ensuring confidentiality
- Compliant with the Florida Drug Free Workplace Act

DOT Stands Its Ground

- DOT motor carrier regulations cover “safety-sensitive” transportation employees
- Pilots, bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire armed security personnel, ship captains and pipeline emergency response personnel, among others.
- No driver may report for or remain on safety-sensitive duty while using any controlled substance
- No driver shall report for or remain on safety-sensitive duty after testing positive for unlawful drugs

DOT Stands Its Ground

- On 10/22/09, DOT issued a statement asserting that its regulated drug testing program will not change based upon the DOJ’s 10/19 statement.
- DOT regs do not authorize ‘medical marijuana’ under state law to be a valid medical explanation for a transportation employee’s positive drug test result.
- “Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana...’ It remains unacceptable for any safety-sensitive employee subject to drug testing under the Dept. of Transportation’s drug testing regulations to use marijuana.”

Americans with Disabilities Act

- Employers may prohibit current illegal use of drugs and alcohol in the workplace; and
- Require that employees report for duty without engaging in the unlawful use of drugs.
- A positive test result establishes “current” use.
- Under federal law, medical marijuana use is excluded from protection as illegal drug use.
- Employers should still approach challenges to test results based upon ADA with care.

DISABILITY, ACCOMMODATION AND LEAVE ISSUES ON THE RISE

Americans with Disabilities Act

Employer Win #1

EEOC v. St. Joseph's Hospital, Inc.
No. 15-14551 (11th Cir. Dec. 7, 2016)

- Reassigning an employee with a disability to a vacant position is a reasonable accommodation. But what if another employee without a disability wants the same position?
- EEOC says employee with disability gets preference.
- 11th Circuit rejects this position.

https://www.fisherphillips.com/resources-alerts-court-employees-seeking-accommodation-must-compete-for

Americans with Disabilities Act

Employer Win #2

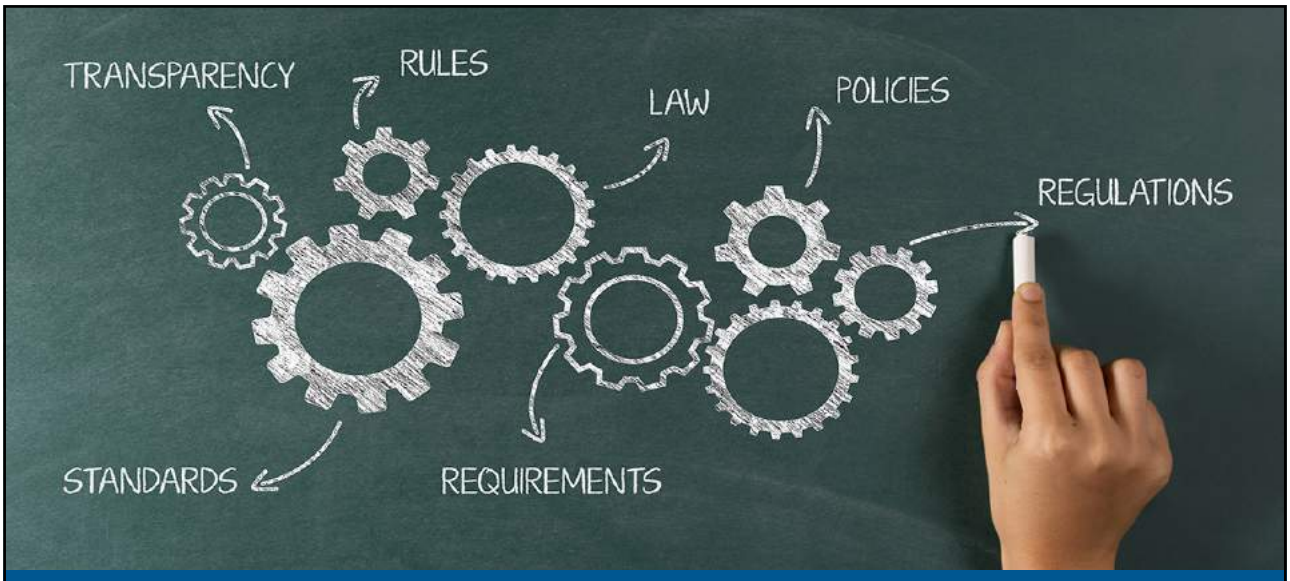
DeWitt v. Southwestern Bell Telephone Co.
No. 14-3192 (10th Cir. 2017)

- Employee sought accommodation in termination meeting, explaining that her misconduct was caused by her disability.
- Court rejected concept of retroactive leniency as a reasonable accommodation.

https://www.fisherphillips.com/resources-alerts-no-excuses-retroactive-leniency-is-not-an

Take Home Tips - Prevention

- Remember leave as an reasonable accommodation is job-protected
- Indefinite or unpredictable leave is not reasonable
- No bright line rule on how much leave needs to be provided as a reasonable accommodation
- Consider being strategic with successive requests through communications with the employee and the doctor:
  - For the employee, manage expectations on the length of time you can reasonably provide job-protected leave
  - With the doctor, ask tailored and pointed questions, such as asking for the basis of the doctor's opinion that the employee will actually be able to return when doctor's prior estimates were inaccurate.



ADA TITLE III

Understanding Title III

Guarantees disabled individuals the "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation."

- **Places of public accommodation** include private and public schools; inns, hotels, motels, and other places of lodging; restaurants, bars; theaters, stadiums, convention centers; bakeries; most retailers; parks, museums; hospitals; and many more.
- **Owners, operators, lessees and lessors** are responsible for ensuring compliance with the ADA. Parties can allocate financial responsibility but not liability.

Website Accessibility

- Title III of the ADA prohibits disability discrimination by places of public accommodation.
- Increased number of lawsuits
- Stay tuned for DOJ guidelines.

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The DOJ's Position

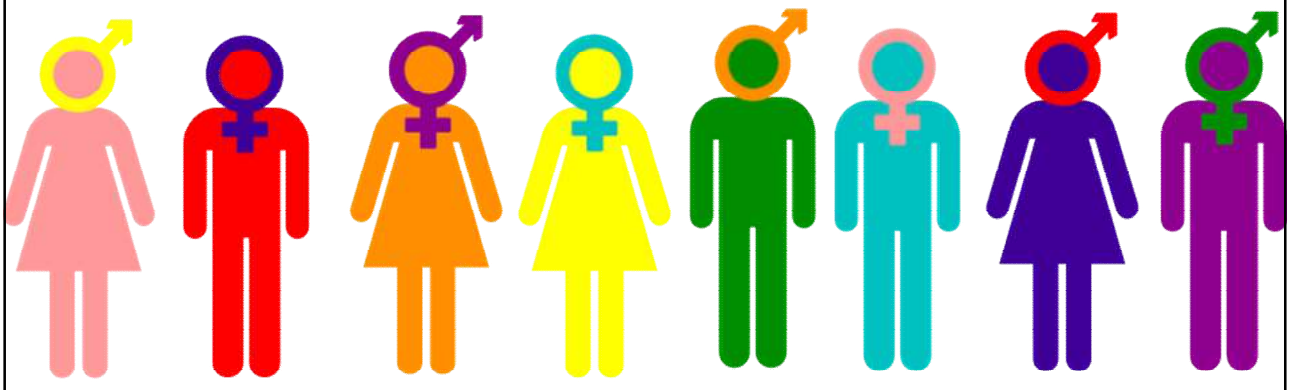
- DOJ has taken the position for years that websites are covered under the public accommodation laws of the ADA
  - The DOJ has taken action against numerous businesses around the country, intervened in existing private litigation, and entered into consent decrees with businesses to cure alleged violations
  - The DOJ has made it increasingly clear over the last several years that it considers a website "accessible" if it complies with the standards of the WCAG 2.0.
  - The agency has used this standard in settlement agreements and consent decrees with businesses it believes to have violated the ADA.

Service Animals

- **I**nclude only dogs individually trained to do work or perform tasks for the benefit of an individual with a disability. No other animals – except trained miniature horses – are permitted. Emotional support dogs are NOT recognized as service animals. Psychiatric service dogs ARE recognized.
- May ask: 1) if the animal is required due to a disability; and 2) what task/work the animal is trained to do. **May not** require: 1) proof of service animal certification/licensing; 2) medical documentation; 3) ask the dog to demonstrate its ability to perform the task/work identified.
- May ask that the service animal be removed when the animal is a direct threat, out of control or not housebroken, or if the presence of the animal would fundamentally alter the program or service provided (e.g. a barking dog in a library). Allergies and fear of dogs are **not** valid reasons for removal.

When you get back to the office

- Survey existing facilities – get input from experienced architect
- Train personnel in dealing with and assisting disabled patrons
- Review and update policies to ensure compliance with the regulations
- Assess the accessibility of your website from the perspective of the user
- Engage the services of a website accessibility expert to ensure that your website has the appropriate features



EMPLOYEE GENDER TRANSITION

What is the Law?

- There is no federal statute that prohibits gender identity or sexual orientation discrimination.
- There is no Florida state law that prohibits gender identity or sexual orientation discrimination.
- Approximately 40 Florida Counties & Cities prohibit employment discrimination for sexual orientation and gender identity:
  - Alachua, Broward, Leon, Miami-Dade, Monroe, Orange, Osceola, Palm Beach, Pinellas and Volusia
  - Atlantic Beach, Boynton Beach, Cape Coral, Delray Beach, Dunedin, Gainesville, Greenacres, Gulfport, Jacksonville, Key West, Lake Worth, Largo, Leesburg, Mascotte, Miami, Miami Beach, Neptune Beach, North Port, Oakland Park, Orlando, Pembroke Pines, St. Augustine Beach, Tallahassee, Tampa, Venice, West Palm Beach, and Wilton Manors

Supporting the Transitioning Employee

- Consider revising your policies.
- Confidentiality and privacy are key.
- During the hiring process, hiring managers and supervisors should be sensitive to the possibility that applicants have transitioned.
  - The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting.
  - In such cases, hiring managers should respectfully ask whether the applicant was previously known by a different name, and confirm with the applicant the name and gender that should be used throughout the hiring process.

Supporting the Transitioning Employee

- Do not ask employees to provide medical or legal documentation of their gender identity.
- Dress and appearance.
  - The Company is encouraged to evaluate, and consider eliminating, gender-specific dress and appearance rules.
  - Once an employee has informed management that he or she is transitioning, agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender.
  - Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.

Supporting the Transitioning Employee

- Names and pronouns. Intentionally using the wrong pronoun can and has led to liability.
  - Managers, supervisors, and coworkers should use the name and pronouns appropriate to the gender the employee is now presenting at work.
  - Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.
  - Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment. Intentionally using the wrong pronoun can and has led to liability.

Supporting the Transitioning Employee

- Workplace assignments and duties.
  - In some workplaces, specific assignments or duties are differentiated by gender.
  - For a transitioning employee, once he or she has begun working full-time in the gender that reflects his or her gender identity, employers should treat the employee as that gender for purposes of all job assignments and duties.
  - Transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to be eligible for gender-specific assignments or duties.
  - Under no circumstances may an agency require an employee to accept a gender-specific assignment or duty contrary to the gender the employee otherwise works as.

Supporting the Transitioning Employee

- Recordkeeping.
  - Records in the employee's personnel file should reflect the employee's new gender identity
- Sick and medical leave.
  - Employees receiving treatment as part of their transition may use sick leave under applicable regulations.
  - Employees who are eligible under the Family Medical Leave Act may also be entitled to take medical leave for transition-related needs of themselves or their families.

Supporting the Transitioning Employee

- Restroom takeaways.
  - Check for local laws and regulations.
  - OSHA requires employers to provide “meaningful” access to workplace restrooms, including for transgender employees.
  - It is recommended allowing transitioning employee to use the restroom they identify with.
  - Do not require transgender employees to use certain restrooms. You can suggest other, more private facilities if available.

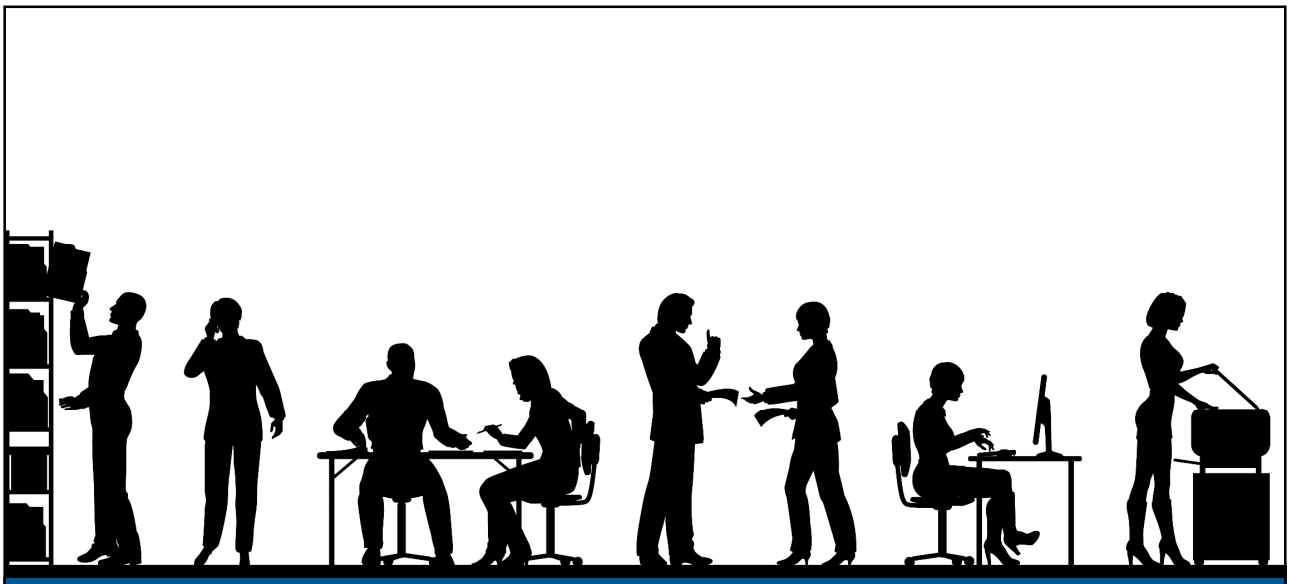
DOL ISSUES

USDOL Issues

- Under the Obama administration:
  - Continuing crackdown on independent contractors
  - Focus on joint employment and "fissured" industries
  - Focus on enforcement
- Changes under the Trump administration:
  - Pro-employer Secretary of Labor
  - Reduced funding
  - Emphasis on compliance, rather than enforcement
  - Less emphasis on "fissured" industries

DOL Rescinds Obama-Era Guidance

- Acosta withdrew Guidance regarding independent contractor misclassification and joint employment in June 2017
- Acosta announced DOL will issue opinion letters again



NLRB UPDATE

Joint Employer Standard

- Obama Administration:
  - Not actual control
  - Potential control sufficient
- Trump Administration:
  - Require proof that one entity has **exercised** control over essential employment terms of another entity's employees and has done so **directly and immediately** in a manner that is not limited and routine.

Employee Handbooks

- Obama Administration:
  - "Reasonably Construe" Standard
- Trump Administration:
  - The "nature and extent" of a challenged rule's "potential impact on NLRA rights" and the "legitimate justifications associated with the rule."

SEXUAL HARASSMENT

Workplace Harassment

- Harassment isn't just about male harassers and female victims.
- Harassment by either sex is prohibited.
- Same-sex harassment also unlawful.
- No one has the right to harass any employee regardless of position or status.
- Harassment of, or by, customers, clients, vendors, etc. is also unlawful.
- Harassing conduct can be physical, verbal, visual, or non-verbal.

The Faragher Affirmative Defense

- The defense established by *Faragher* requires that the **employer** prove:
  - It had procedures to **prevent and respond** to complaints of harassment; and
  - The employee **failed to reasonably take advantage** of the procedures or the employer took **adequate remedial action** upon receiving notice

Workplace Policies

Effective anti-harassment policies should include a statement that the following are prohibited:

- Unwelcome Sexual Advances
- Making Sexual Favors the Basis for Employment Decisions
- Hostile Working Environment (repeated offensive comments, actions, and/or conduct)
- Inappropriate Language
- Offensive Visuals
- Unwanted Physical Contact

Implementation of Workplace Policies

- Training, Training, Training
- Responding to harassment complaints:
  - Document the complaint
  - Document accounts of witnesses
  - Get the alleged harasser's story
  - Take action to prevent future conduct
  - Communicate action taken
- Consistency
- Retaliation is prohibited

RETALIATION

Retaliation Under Federal Law

To establish a claim of unlawful retaliation under Title VII, a plaintiff must show:

- Employer was aware that employee engaged in **protected activity**
- Employer took **adverse employment action**
- A **causal connection** between the protected activity and the adverse employment action
- Employee's protected activity is the **but-for cause** of the adverse employment action

Case Study

Frank, a customer service operations analyst with a history of performance problems, received a mixed review in his last evaluation. His supervisors noted excessive Internet usage, lack of respect for personal boundaries in the workplace, and that Frank was sometimes argumentative with co-workers. Significantly, there was an incident during which Frank was belligerent toward a customer, and on another occasion, he failed to complete a critical project on time.

Frank's performance did not improve during the months following his evaluation, although his supervisor continued to document performance deficiencies.

Four months later, when the company was thinking about firing Frank, he asked for FMLA leave.

So… was it lawful to fire Frank?

Here's What the Court Decided

***Brown v. ScriptPro*, 700 F.3d 1222 (10th Cir. 2012)**

The Court found that Frank's discharge was not FMLA discriminatory. The Court focused on the fact that Frank had **previously** received mixed performance reviews, and that his performance problems **continued** in the months leading up to his FMLA request.

Key takeaways:

- Documentation
- Performance Management
- Consistency

Other Recent Case Decisions

- ***Elmore v. Washington Metro Area Transit* –** Motion for summary judgment denied
- ***Cervantes v. International Hospitality Associates* –** Motion for summary judgment on retaliation claim denied
- ***James v. Total Solutions* –** Motion for summary judgment granted

FLSA AND FCRA LAWSUITS

Common FLSA Collective/Class Actions

- Misclassification of exempt status
- Off-the-clock
- Meal/rest break
- Failure to include non-discretionary bonuses and other compensation (e.g. commissions) in the regular rate for proposes of computing overtime
- Misclassification of independent contractor status
- Joint employment issues

FCRA Litigation Explosion

- Fair Credit Reporting Act lawsuits are the latest trend in employment litigation:
  - Seek relief for violations of the **content of forms** used for disclosures/authorizations of background reports conducted by consumer reporting agencies
  - Seek relief over the **failure to notify applicants** of employers' reliance on background checks
- Class Action Suits
- Multi-Million Dollar Settlements over hyper-technical violations
- Lawsuits filed doubled in 5 years

Anticipating A Class/Collective Action

- Audits to reveal vulnerabilities
- Management training
- Off-the-clock policies that require a signature
- Audit background checks forms and ensure strict compliance with technical requirements

PAY EQUITY

Trends at Federal and State Levels

- **Equal pay** laws prevent unequal pay for comparable work
  - *Focus is on what is "comparable"*
  - *Can't lower wage rates to even up salaries*
- **Wage transparency** laws prevent employers from barring talk about salaries among workers
  - *Apply to supervisors*
  - *Permit civil lawsuits*
- **Previous pay history** often can't be used to determine salary
  - *Sometimes even bar inquiries during application period*

What Should You Do?

- Review or create compensation policies and procedures, including checks and balances, and train managers on implementation.
- Ensure that someone in HR or a similar position is watching for offers that deviate from standard policies (such as providing health insurance at no cost whereas employees typically absorb some percentage of cost).
- Assess the performance evaluation process and its role in pay decisions; standardize the process.

What Should You Do?

- Train decision-makers:
  - How to make proper pay decisions that comply with organizational policies and the applicable law.
  - The appropriate factors to consider when making pay decisions.
  - How to apply guidelines and exercise discretion properly; and
  - How to document the bases for decisions.

What Should You Do?

- Consider conducting an attorney-client privileged **pay audit** in specific locations or among certain groups of employees.
  - Some states, such as Massachusetts and Oregon, provide a safe harbor against liability if a pay audit is conducted in accordance with the new laws and reasonable steps are taken to address pay disparities.
  - There is currently no safe harbor under federal law or other state laws so it is important to put the appropriate legal protections into place at the start of the audit to protect potentially harmful documents and information from disclosure.

Fisher Phillips' Pay Equity Interactive Map

Visit: https://www/fisherphillips.com/equity

Final Questions

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lmcglynn@fisherphillips.com
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Brett Owens
bowens@fisherphillips.com
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