Employment Law Changes Around the World
January 2013

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Canada

A. Supreme Court of Canada

R v. Cole, 2012 SCC 53

The Supreme Court of Canada had previously established that an individual as a right to privacy on personal computer. In Supreme Court decision of R v. Cole, the court extended this right, under certain circumstances, to a computer issued to an employee by their employer.

Facts

Richard Cole was a high school teacher in Ontario who was given a work-issued laptop that he was permitted to use for incidental personal purposes.

A technician performing routine maintenance on Mr. Cole's found a hidden folder containing nude photographs of an underage female student. The technician reported the findings to the school principal who directed him to copy the photographs to a CD. The laptop was seized by the principal and additional information was copied to another disc. The laptop and the CDs were turned over by the school to the police who reviewed the items without a warrant.

The trial judge excluded all the computer material finding that police had violated Mr. Cole's right to be secure against unreasonable search or seizure section 8 of the *Canadian Charter of Rights and Freedoms*. The Crown was not able to offer any further evidence and thus the charges were dismissed. The summary conviction appeal court reversed the trial judge's decision and found that Mr. Cole's rights under section 8 of the *Charter* were not violated however this decision was set aside by the Court of Appeal who again excluded all the computer material.

Supreme Court of Canada

The Supreme Court of Canada agreed with the Court of Appeal in that it found that Mr. Cole's rights under the *Charter* had in fact been violated. However, the court decided that the unconstitutionally obtained computer material would not be excluded under section 24(2) of the *Charter.*
According to the court, "privacy is a matter of reasonable expectations. An expectation of privacy will attract *Charter* protection if reasonable and informed people in the position of the accused would expect privacy." When determining whether an individual has a reasonable expectation of privacy, the court found that it must apply the "totality of the circumstances" test the court first outlined in *R v. Edwards*. There are four considerations in this test:

1. An examination of the subject of the alleged search;
2. A determination as to whether the claimant had a direct interest in the subject matter;
3. An inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
4. An assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.

The subject matter of the search was the computer material and the court found that Mr. Cole's direct interest and subjective expectation of privacy could be "inferred from his use of the laptop to browse the Internet and to store personal information on the hard drive".

The last consideration was whether Mr. Cole's subjective expectation of privacy was objectively reasonable. In *R v. Morelli*, the court found that computers "contain the details of our financial, medical and personal situations" that "reveal our specific interests, likes, and propensities, recording in the browsing history in cache files the information we seek out and read, watch or listen to on the Internet". Given the highly personal nature of this information, a higher expectation of privacy is favoured.

However, the court recognized that, unlike *Morelli* where there was a personal computer involved, this case involved a work-issued computer, which suggests a lower level of expectation of privacy. The

school had policies in place claiming ownership of not only the laptop itself but all information and data stored on it. Employees were permitted to use the computer for personal reasons.
Overall, the factors weighed in favour and against Mr. Cole's reasonable expectation of privacy. In the end, the court found that:

> The nature of the information in issue heavily favours recognition of a constitutionally protected privacy interest. Mr. Cole's personal use of his work-issued laptop generated information that a meaningful, intimate, and organically connected to his biological core. Pulling in the other direction, of course, are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole's privacy interest in his laptop, at least in comparison to the personal computer at issue in *Morelli*, but did not eliminate it entirely.

While the court found that the search and seizure by the school did not constitute unreasonable search and seizure under the *Charter*, the subsequent search and seizure by the police did. In coming to this conclusion, the court rejected the Crown's justification of "third party consent" wherein an employer "can validly consent to a warrantless search or seizure of a laptop issued to one of its employees". While the court recognized that this idea had gained traction in the United States, the court denied that a third party could "validly consent to a search or otherwise waive a constitutional protection on behalf of another."
Despite the finding that the computer material was unconstitutionally obtained, the court decided that its admission would not bring the administration of justice into disrepute and therefore the evidence would not be excluded under s. 24(2).

This decision clearly represents the court clarifying where the reasonable expectation of privacy exists and it includes work-issued computer.

It should be noted that the accused conceded that there was no problem with respect to the school's search and seizure of the computer material and the court states that they would "leave for another day the finer points of an employer's right to monitor computers issued to employees". Further, the workplace in question was also not a typical workplace as it was a school where there is a positive duty to ensure a safe environment for students.

In this case, the employer had policies in place regarding ownership over both the computer and any data stored on it but this was just a factor in the consideration of the expectation of privacy. So while it is important for employers to have clearly worded user policies in this regard, they should be aware that such policies will not necessarily be determinative of the privacy issues.

Dismissal for just cause

The Supreme Court of Canada previously established that when assessing if an employee was dismissed with just cause, a trial judge must apply a contextual approach when reviewing all relevant facts (see *McKinley v. BC Tel*, 2001 SCC 38).

Bennett v. Cunningham, 2012 ONCA 540

In *Bennett v. Cunningham*, the Court of Appeal for Ontario upheld a trial judge's finding of dismissal with just cause, concluding that the decision was based on a contextual approach that analyzed the entire factual record.

Bennett was a junior lawyer in Cunningham's law firm. In July 2002, Bennett became concerned that she did not have the resources and technology needed to manage her files. In response, Cunningham instructed her staff to create a file list for Bennett's files. Cunningham also invested in voicemail and time docketing software. In November 2002, Bennett expressed concern that not all of her billed fees were collected from clients and that some time dockets were incorrectly entered. Cunningham told Bennett that these errors would be corrected. Prior to Christmas, Bennett wrote to Cunningham listing nine areas of concern. The letter contained numerous allegations to the effect that Cunningham was dishonest, negligent, disorganized and incompetent. However, Bennett expressed her wish to work with Cunningham to resolve the issue. In January 2003, Bennett was terminated.

The trial judge found that Cunningham properly responded to Bennett's concerns. Bennett had been "insolent to the extent that the employment relationship could no longer be maintained" and that the letter "was highly critical of the operations of the law office and of Ms. Cunningham's integrity." The events leading up to the letter, as well as the letter itself, undermined Cunningham's confidence in Bennett such that Cunningham had just cause to terminate.

The Divisional Court held that the trial judge failed to apply a contextual approach to a determination of just cause for dismissal. Although Bennett's letter was harsh, it was a private communication focusing on administrative issues. The letter was not distributed publicly and did not cause the employer embarrassment or financial loss. Further, the Divisional Court held that there is a "strong public policy interest in encouraging open and frank discussion between employer and employee." It concluded that Bennett's letter did not create a situation in which trust in the employment context was destroyed.
In reversing the Divisional Court's decision, the Court of Appeal held that the trial judge properly applied a contextual analysis when considering all of the facts before him. The trial judge was entitled to make conclusions based on his analysis of those facts, and absent a palpable and overriding error, his decision will not be overturned.

Employers may succeed in a dismissal case with minimal evidence, provided that the evidence clearly demonstrates deterioration in the employment relationship. The decision also warns employees to be mindful of their language when criticizing their employers, and to ensure that any allegations against their employers can be fully substantiated.

B. Recent Ontario Cases

Bowes v. Goss Power Products Ltd., 2012 ONCA 425 (CanLii)

Facts
The Appellant, Peter Bowes, had entered into a written contract of employment with the Respondent, Goss Power Products Ltd., which provided for six months of notice of pay in lieu of if his employment was terminated without cause. There was no mention of his duty to mitigate.

Mr. Bowes was terminated without cause and received a termination package that advised he would be paid his six months salary but he had a positive duty to seek employment and to keep his former employer apprised of any such efforts. Mr. Bowes found employment after two weeks and Goss stopped paying his termination pay after paying the statutorily required three weeks. Mr. Bowes brought an application seeking a determination of his rights under the contract. The application judge found that the contract did not exempt Mr. Bowes from his duty to mitigate unless it had directly or implicitly relieved him of this duty. As, in this case, the contract was silent, Mr. Bowes was not entitled to the full amount under the contract because he had mitigated his losses.

Mr. Bowes appealed this decision.

Ontario Court of Appeal
The Court of Appeal disagreed with the finding of the application judge. The court found that a contractual fixed term of notice or payment in lieu of is not equivalent to common law damages for reasonable notice and should not be treated as such.

Specifically, the court states that "an employment agreement that stipulates a fixed term of notice or payment *in lieu* should be treated as fixing liquidated damages or a contractual amount. It follows that, in such cases, there is no obligation on the employee to mitigate his or her damages."

Therefore, by contracting for a fixed sum, the agreed upon notice period or payment in lieu of could be characterized as liquidated damages or contractual amounts and thus the duty to mitigate did not automatically apply. The court rejected the argument that Mr. Bowes would be receiving a "golden

parachute" because he would be receiving a double payment as it was not Goss who was paying twice and the contract restricted Mr. Bowes recovery to 12 months base salary and it did not include a bonus or other benefits.

The court concluded that "where an agreement provides for a stipulated sum upon termination without cause and is silent as to the obligation to mitigate, the employee will not be required to mitigate."

The important fact in this case was the contract was silent on mitigation. The court held that in such a case, where the notice period or pay in lieu of has been fixed then the duty to mitigate does not automatically attach. However, the court does state that it is "indisputable that the parties could have specifically agreed that mitigation did apply".

Therefore, this is another issue that employers will need to turn their minds to in the drafting of employment contracts to ensure there is clear wording creating an employee's duty to mitigate where there is a desire to create a fixed term of notice or pay in lieu of.

Pritchard v. Commissionaires Great Lakes, 2012 HRTO 1466 (CanLii)

Facts

The Applicant, Timothy Pritchard, filed an Application under section 34 of Part IV of the Human Rights Code, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment on the basis of disability. The Applicant named the Commissionaires Great Lakes (the "Commissionaires"), as well as members of the Commissionaires' executive (the "Executive") as respondents.

The Applicant was employed as Director of Professional Services with the Commissionaires since March 10, 2008. The Applicant alleged that he was diagnosed with severe arthritis. In or around May 6, 2010, the Applicant advised his employer that he would be having hip replacement surgery on June 16, 2010, and that he would subsequently require 8 to 12 weeks off of work for recovery.

On June 9, 2010, approximately one month after advising his employer of his upcoming hip replacement surgery and four days prior to his scheduled surgery, the Applicant was advised that his employment with the Commissionaires was terminated. The Applicant believed "the respondents did not want to pay him during his sick time and terminated his employment as a cost saving measure". As such, the Applicant alleged that his termination was related to his hip replacement surgery and that his termination was a defacto method by the Commissionaires to avoid paying sick pay or medical leave.

In the Response to the Application, the Respondents argued that the Applicant's duties included a "new and untested venture" insofar as the Applicant's duties encapsulated the responsibility for the Commissionaires' training academy. Moreover, "based on the uncertainty of this venture, the Applicant's "letter of appointment" was clearly crafted to allow either party to end the employment relationship on short notice". The Respondents further submitted that the Applicant's work product was "less than expected"; the Applicant's job requirements were changed over time; the Applicant's position was made redundant; business was declining; and that their decision to terminate the Applicant was based upon the restructuring of various functions and departments as evidenced by the elimination of three positions. The Respondents also illuminated the fact that two other staff of Commissionaires required hip surgeries and that the employment of both employees was not terminated.

Following the Respondent's decision to terminate the Applicant, various evidence suggested that the Respondents subsequently "took steps to fill a very similar position".

The Law

The Human Rights Tribunal of Ontario ("HRTO") deferred to the relevant *Code* provisions as follows:

Relevant *Code* provisions

[28] Sections 1 and 9 of the *Code* state as follows:

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of… disability.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

[29] In addition, “disability” is defined in s. 10(1)(a) of the *Code*, in part, as follows:

> 10. (1)(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device…

<u>Analysis</u>

The extent to which the Applicant had a disability within the meaning of the *Code* was not a contentious issue in *Pritchard*. The HRTO was satisfied that the Applicant’s medical condition requiring him to have hip replacement surgery constituted a disability within the meaning of the *Code*.

With respect to whether the Applicant was subjected to discrimination on the basis of his medical condition when he was terminated, the HRTO found that “the Applicant’s pending disability-related absence from work was a factor in the termination of his employment”. In paragraph 39, the HRTO stated the following:

> [39] In my view, the decision to terminate the applicant’s employment, and the communication of that decision to him, appears to have occurred with considerable haste, and his employment was terminated approximately five business days before his scheduled hip replacement surgery. At that point, the applicant had been employed by the Commissionaires for over two years. In addition, the respondents do not appear to have taken steps to find a replacement for the applicant’s primary responsibility of selling training until more than 3.5 months after his employment was terminated, and I note that this occurred during a time after which Ms. Courser testified the executive was focusing more on sales in order to improve business. I also note that, while the Commissionaires paid the applicant 3 months’ severance in accordance with the terms of his Offer of Employment, they were not required to pay him for over 4 weeks of accumulated sick days that he had proposed to use while recovering from his surgery, when they terminated his employment. Although Ms. Courser denied that the applicant’s hip replacement surgery was a factor in the decision to eliminate his position, she testified that she was aware the applicant needed a hip replacement, and the executive team talked about it and were aware he would need time off. In my view, there is sufficient evidence to draw an inference, on a balance of probabilities, that the applicant’s pending time off work for surgery was a factor in the decision to terminate his employment.
>
> [42]... In the circumstances, I find the Commissionaires, and not the individual respondents, to be liable for the violation of the *Code* when the applicant’s employment was terminated.

<u>Remedy: Injury to Dignity, Feelings and Self-Respect</u>

Pursuant to the HRTO’s remedial powers as set out in s. 45.2(1) of the *Code*, the HRTO has the power “to order monetary compensation and restitution for loss arising out of the infringement, including compensation and restitution for injury to dignity, feelings and self-respect”.

In *Pritchard*, the Applicant sought compensation with respect to “mental anguish, reputation damage, family stress and embarrassment”, among other things. .

In assessing the appropriate remedy, the HRTO provided a genealogy regarding the evolution of what used to be referred to as "mental anguish", and its respective criteria. In concluding that the Applicant be awarded $10,000 "for the impact of the discriminatory termination" of his employment "on the applicant's dignity, feelings and self-respect", the HRTO delineated the following criteria in making such determination:

> **Injury to dignity, feelings and self-respect**
>
> [47]... Although the remedial provisions of the Code no longer refer to "mental anguish", the Tribunal has found the criteria developed in previous cases helpful in determining the appropriate damages for injury to dignity, feelings and self-respect...The Divisional Court, in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), (2008) 295 D.L.R. (4th) 425, held that the following are among the factors that Tribunals should consider when awarding general damages: **humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment [emphasis added].**
>
> [48] The applicant submits in his Application that, as a result of the respondents terminating his employment, he was not able to fully and properly look for work during his convalescence. He submits that this placed him under a significant financial burden, and created a significantly high stress level on him and his family, and left him with a feeling of embarrassment, despite knowing that he did nothing wrong. It was also apparent from the applicant's demeanor, when giving evidence at the hearing about the dismissal, that the termination of his employment had upset him.
>
> [49] I accept that the applicant felt embarrassed when his employment was terminated. I also accept that it would have been stressful for the applicant to have lost his employment approximately five working days prior to his hip replacement surgery, and that his recovery from surgery would have impacted his ability to search for other employment. In all of the circumstances, and considering that the applicant ultimately did find and commence alternate employment at the end of his convalescence, **I find an award of $10,000 to be appropriate compensation for the impact of the discriminatory termination of his employment, attributable to the Commissionaires, on the applicant's dignity, feelings and self-respect [emphasis added].**

C. <u>Recent Manitoba Cases</u>

<u>Wrongful Dismissal claims</u>

Irvine v. Jim Gauthier Chevrolet Oldsmobile Cadillac Ltd.
2012 MBQB 268 (Man. Q.B)
The plaintiff employee commenced working for the defendant employer in 1990. The plaintiff ended his career with the defendant in the position of General Manager and Vice-President.

In 2006, the plaintiff began experiencing eye problems that caused him to go blind in his left eye by 2007. The plaintiff stated that the issues with his vision did not affect his ability to carry out the duties of his job and he remained employed by the defendant.

Over the course of the next several years, the plaintiff began to require assistance with many of his duties. In addition, the defendant began receiving complaints from customers regarding the plaintiff's temperament.

In May 2009, the defendant came to the conclusion that the plaintiff was unable to carry out the duties of his job. The defendant called a meeting with the plaintiff, wherein the defendant suggested the plaintiff go on long-term disability, get his eye fixed and then return to work where his job would be waiting for him. Following the meeting, the plaintiff commenced a leave of absence, but was kept on as an employee.

The employer continued to pay its share of the plaintiff's insurance premiums on the group policy for disability insurance. The plaintiff continued to be shown as an employee of the defendant until it was learned in October 2009 that he had gone to work for another car dealership in Winnipeg.

The plaintiff alleged that he had been wrongfully dismissed from his employ with the defendant and brought an action against the defendant for damages. As an alternative claim, the plaintiff stated he had been constructively dismissed. Oliphant J. held found that the defendant employer had merely suggested the plaintiff go on long-term disability until his health recovered at which time he could come back to work if he felt he could do the job. These actions, Oliphant J. concluded, did not amount to termination of the plaintiff's employment expressly or constructively. Rather, the court held that it was the plaintiff who terminated his employment by obtaining alternate employment without notice to the defendant.

Gjema v. Mercury Specialty Products Inc.
2012 MQQB 83 (Man. Q.B.)

The plaintiff employee brought an action for wrongful dismissal. The plaintiff was employed by the defendant from September 2006 until February, 2010.

In negotiating the terms of the plaintiff's employment, the plaintiff and defendant agreed via email to various terms, including the provision of one years' salary in the event the plaintiff was dismissed within the first two years of his employ with the defendant. Upon commencing work, the plaintiff was presented with an employment contract for execution. The contract presented to the plaintiff contained terms that varied from those agreed in the email exchange, including a severance scale which provided three months' severance in the first year, six months' severance in the second year and one years' severance after two years. In addition, the proposed employment contract contained a provision obliging the plaintiff to "immediately seek reasonable alternate employment and mitigate any loss of income he may suffer" in the event of termination. Despite the commencement of the plaintiff's employment, the parties did not execute the employment contract.

In the days prior to the plaintiff's termination, an altercation took place between the plaintiff and another employee. Following the altercation the employee was dismissed for cause, without notice and without severance pay. The other employee involved in the altercation received a one-week suspension.

After considering the evidence, Schulman J. held that the plaintiff was not the instigator of the altercation; rather, the other employee involved in the altercation had provoked the plaintiff. The court held that the plaintiff had been wrongfully dismissed, without cause. The plaintiff was awarded damages equivalent to one years' pay in lieu of notice, which reflected the severance amount agreed to by the parties in the email exchanges prior to the plaintiff commencing his employment with the defendant.

The plaintiff was also awarded damages to compensate him for loss of the opportunity to be provided with funding for education programs and for loss of reimbursements of RRSP contributions for his 2009 earnings. The court, however, declined the plaintiff's claim for damages for mental distress, on the basis that the plaintiff failed to produce any medical evidence in support.

Commenting on the applicability of the principles of mitigation, Schulman J. held that the plaintiff was not bound by the mitigation provision in the unexecuted employment agreement. However, Schulman J. continued, noting that the principle of mitigation is a fundamental part of an assessment of damages and notwithstanding the integral nature of mitigation, the duty to mitigate can be negated, expressly or impliedly. In the circumstances, a covenant to pay twelve months' severance pay was not a negation of the duty to mitigate. Further there was nothing in the evidence demonstrative of an agreed waiver of mitigation. On that basis, the court ordered that the any employment income earned by the plaintiff in the twelve-month severance period following the termination of his employment was to be deducted from the damages awarded by the court.

Restrictive Covenants

Steinke v. Barrett
2012 MBQB 49 (Man Q.B.)
The plaintiff, a sole proprietor of a massage therapy clinic, entered into a professional services agreement with the defendants, a group of independent contractors, who provided massage therapy services. The professional services agreement contained a clause prohibiting the defendants from providing massage therapy services within five kilometers of the plaintiff's business for two years after the contract ended. The professional services agreement further prohibited the defendants from removing patient files upon the conclusion of the contract, but did allow for the defendants to copy files and contact clients they had specifically treated.

The defendants terminated the professional services agreement and immediately thereafter began providing massage therapy services at a business within five kilometers of the plaintiff's business and mailed advertisements to their clients. The plaintiff brought an application for an interlocutory injunction prohibiting competition and solicitation by the defendants.

The application was dismissed and the interlocutory injunction was denied. McKelvey J. found that the non-solicitation clause was reasonable as it was flexible and unambiguous. While the plaintiff a protectable interest in her clientele, the evidence demonstrated that the contravention of the non-solicitation clause was marginal.

As to the non-competition clause, McKelvey J. concluded that while the plaintiff had a proprietary and legitimate interest to protect with respect to her personal client base, that proprietary interest did not extend to those clients treated by the defendants where active solicitation was permitted under the agreement. Furthermore, the court held that in a city the size of Winnipeg, the scope and duration of the non-competition clause were on the periphery of reasonableness.

England (UK)

This summary looks at a few of the major developments in employment law in the past year and looks forward to some significant changes in the pipeline for 2013.

Discrimination
It's been six years since age discrimination became unlawful in the UK. In the past year we have had the first two Supreme Court decisions on this topic. The two key age discrimination issues that have troubled employers in the past year or so have been the abolition of the default retirement age ("DRA") of 65 which took effect October 2010, and the extent to which cost can be taken into account, in particular in the conduct of redundancy exercises, where the process adopted by the employer may appear to be age discriminatory

Seldon v Clarkson Wright and Jakes
Since the abolition of the DRA the long awaited decision of Seldon v Clarkson Wright and Jakes is relevant to all employers who need to justify any potentially age-discriminatory practices.

Mr. Seldon was a partner in a law firm. He signed a partnership deed agreeing to retire the December after his 65th birthday. When he reached 65 he realized he needed to continue working for financial reasons. He asked to stay on but this was refused on the basis there was no business need. He issued proceedings for direct age discrimination in March 2007. He failed to persuade the employment tribunal, the Employment Appeal Tribunal (EAT) and the Court of Appeal that his retirement was discriminatory. The Supreme Court also dismissed his appeal.

In addressing whether Mr. Seldon's compulsory retirement was discriminatory the Supreme Court looked at whether it could be "objectively justified". While the test (which entails showing that the practice adopted is a proportionate means of achieving a legitimate aim) was not in doubt, how to satisfy the test in practice has been the important issue. In its decision the Supreme Court has given broad but clear guidance as to the steps that have to be taken, and the evidence which has to be produced, to meet the test. For direct discrimination, which is what Mr. Seldon was alleging, this entails showing that:

- the business aim is capable of being legitimate under European law and national legislation;
- it is legitimate in the particular circumstances and is in fact being pursued; and
- the means adopted are both appropriate and necessary.

The Supreme Court upheld two legitimate aims. The first was inter-generational fairness, which in this case involved the retention of senior lawyers by creating opportunities for promotion to partnership as well as enabling workforce planning. Secondly, and more controversially, limiting the need to expel partners through performance management and so preserving their dignity and avoiding humiliation.

The principles at the heart of this case need to be applied with real care. For example, while preserving dignity was upheld as a legitimate aim in potentially justifying age-related practices, it will be essential that employers have hard evidence and do not to rely on assumptions and stereotypes about the ability of older workers to perform when reaching decisions about managing the workforce.

Woodcock v Cumbria Primary Care Trust
On 22 March 2012 the Court of Appeal handed down an important decision on whether employers can objectively justify age discrimination when making a significant costs saving in a redundancy situation. It upheld the decision of the EAT in Woodcock v Cumbria Primary Care Trust that the objective justification test was met on the facts and the Trust had not directly discriminated against the claimant.

Mr. Woodcock's role as Chief Executive of a hospital became redundant as a result of a reorganization. He was shortlisted for one of the new chief executive roles but was unsuccessful at interview. He remained employed for some months but no alternative was found. As he was entitled to 12 months' notice, and his 49th birthday was looming, the decision was taken to give him notice, to expire before his

50th birthday, when he would otherwise have benefited from an enhanced pension. This saved the Trust over £500,000. The Employment Tribunal found that the Trust's action was objectively justified in the circumstances. There was no doubt that the reason for dismissal was redundancy. The avoidance of the additional cost constituted the Trust's legitimate aim and the steps were proportionate to achieve this.

The Court of Appeal looked carefully at the facts and confirmed that Mr. Woodcock's treatment could not be characterized as aimed at avoiding cost and no more. They said that the reality is that it will very rarely be the case that an employer seeks to avoid or save cost without good reason. If to do so will adversely impact on employees of a particular age, the employer must be able to show that its actions are a proportionate means of achieving a legitimate aim (in this case, dismissing on grounds of redundancy). The challenge is in striking the balance.

This judgment is of comfort to cost-conscious employers, where significant enhanced payments may become due under a pension scheme at a given age. Taking these costs into account when reaching a decision on the timing of a redundancy may be essential in seeking to balance the books.

Competing employees and the contract of employment

This is another area where there have been significant case law developments in the last year.

With the exception of the duty of confidentiality any restrictions on competition contained in the contract of employment do not continue after the contract has been terminated. Should an employer wish to prevent its former employees from competing with them, and/or soliciting their clients and employees they must put specific provisions to deal with this into the contract of employment. These provisions will only be enforceable if they protect a legitimate business interest. If they are too widely drafted or no legitimate interest is established they will be void and unenforceable.

<u>Ranson v Customer Systems Plc</u>

In the UK directors owe fiduciary duties to their companies. This means they must act in the interests of their company rather than their own interests. Examples of fiduciary duties include a duty of confidentiality, a duty to avoid conflict, and a duty not to profit from their position. In addition to this every employment contract contains a term implied by law that an employee will serve their employer with good faith and fidelity (or loyalty).

Mr. Ranson, who was an employee and not a director, planned to leave his employment to set up a rival company. Before he left his employer he procured an order for work for his new business from one of the employer's customers; spent an evening trying to procure work from another customer; discussed his plans with another employee; extracted contact numbers for future use and emailed various forms for use in the new business. Following his resignation three of his former colleagues went to work with him. Mr. Ranson's contract of employment was brief, containing a confidentiality clause, and a clause preventing him from other employment while employed. There were no post termination restrictions preventing him from taking business or staff.

Mr. Ranson's former employer issued proceedings for breach of contract in the High Court alleging that Mr. Ranson was in breach of his duties of confidence, good faith and loyalty. The High Court judge held that Mr. Ranson was in breach of his contractual and fiduciary duties when he applied for and canvassed work for his new company while he was still employed. These actions put him in a clear position of conflict. Furthermore he should have told the claimant company he was doing this so they could have pitched for that work. He was also found to be in breach of his contractual duties of loyalty and good faith when he transferred business contacts and documents to use in the future. The Court of Appeal overturned this decision criticizing the High Court's approach in finding that there was a breach of both a fiduciary duty, which in the Court of Appeal's view did not exist, and of his contractual obligations as these were not set out in the contract.

This case contains some important lessons. First the case draws a clear distinction between the position of directors and employees. For employees, no matter how senior they are, the starting point will be their contract of employment in determining what duties they owe. The extent of the implied duty of fidelity,

which is owed by all employees, will depend on what is set out in their contract of employment and their job description. However, this case demonstrates that there are limits on this duty and that it is essential for employers to incorporate more detailed and comprehensive restrictions into employees' terms and conditions of employment through the contract and/or the employee handbook. In addition, it is very important that for long standing employees, such as Mr. Ranson, contractual terms are updated or re-issued to include express reporting obligations as employees become more senior and important to the organization. This is not least because unless there is an organizational approach to restrictive covenants they may be found to be unenforceable as another decision given by the High Court shows.

CEF Holdings Ltd and another v Mundey and others
CEF Holdings Limited ran a business manufacturing and selling electronic components. A number of their employees left to join a business that was set up to compete with them. Two of these employees were general managers who did not have any post termination restrictions in their contracts. The other 17 employees had restrictions preventing them from competing with their former employer or recruiting former colleagues for six months after their employment ended. The High Court held the recruitment restrictions were invalid because they were unreasonably wide: they prevented the employees soliciting former colleagues with whom they had no contact during their employment and the way the clause was drafted meant they could not know who they could recruit. More interestingly the court noted the lack of comparable restrictions, both not to recruit or compete, on the individuals' managers and the fact that the employees only had to give a week's notice. Both of these factors undermined the argument that there were legitimate interests to protect.

The impact of this case will be particularly felt for organizations who decide to bring in restrictions for new joiners. Provided the restrictions are carefully drafted (unlike in this case) such restrictions may in theory be enforceable. However, if the employer does not re-visit the contracts of the more senior people in the management chain at the same time, that careful drafting will be undermined.

Transfer of undertakings

Eddie Stobart Ltd v Moreman and others
This case looked at whether there was an organized grouping of employees for the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) purposes where shift patterns and working practices on the ground meant that some employees worked principally on a contract which went to another provider.

The employer was a warehousing and logistics service provider. It had 35 employees at one site servicing at least five clients. The contracts reduced to two clients: Forza and Vion. The timing of its orders meant that most of the products for Forza were put together principally by the night shift. That in turn meant that nightshift employees worked principally on tasks for the Forza contract and the dayshift employees principally on the Vion contract. When the employer closed their site FJG Logistics Ltd picked up the Vion work. The employer took the view that all employees engaged wholly, or for 50% or more of their time, on the Vion work over the past 90 days should transfer to FJG. FJG did not accept that TUPE applied to the outsourcing of the contract. The 35 employees were dismissed by Eddie Stobbart. The claimants bought employment tribunal proceedings against their former employer and/or FJG. FJG applied for the claims against it to be struck out as having no reasonable prospect of success. It argued that the claimants had not made out a case that they were "assigned" to any particular client and, therefore, could not rely on TUPE. At a pre-hearing review, the tribunal agreed to strike out the claims against FJG, but on the basis that there was no organized grouping of employees. They spent the majority of their time working on the Vion contract because of the way the former employer organized its shift patterns, not because they were organized into a team whose principal purpose was to carry out work for Vion. The former employer appealed against the decision stating that to satisfy the "organized grouping" test, it was sufficient to show that the claimants worked mostly for Vion and it was not necessary for the employees to be organized as members of a "Vion team". The EAT disagreed holding that for there to be an organized grouping of employees they must be organized by reference to the requirements of the client in question. The judge sets out that the paradigm of this will be where employees are organized at "the Client A team", but recognized that the principle might be satisfied where the identification is less explicit.

As a result employers carrying out outsourcing may want to organize themselves along client lines, if they do not already and this is practicable, to ensure that TUPE applies. Employers who find themselves as a possible transferee in an outsourcing situation will want to find out how employees have been organized as they may be able to argue that there is no organized grouping of employees, to prevent TUPE from applying. Employees must be organized by reference to the requirements of the particular client. The employees in this case spent the majority of their time working for a particular client, but were organized according to their shifts not according to the requirements of that client.

In McCarrick v Hunter the Court of Appeal upheld the EAT's decision that there will be no service provision change in the context of second generation outsourcing where the activities carried out by different contractors before and after the change are on behalf of different clients. Mr. McCarrick was employed to provide property services to property company Waterbridge, and later transferred to a subsidiary of Midos WCP Management ("WCP") of which the managing director was Mr. Hunter. Receivers were appointed who in turn appointed a new property services company, King Sturge. At Mr. Hunter's direction, Mr. McCarrick carried out services assisting King Sturge and became employed directly by Mr. Hunter. When he was dismissed by Mr. Hunter he claimed unfair dismissal. He alleged that there had been a service provision change under TUPE on the basis that the services had transferred from WCP to Mr. Hunter.

The employment tribunal had found that the client receiving the property services had changed from Waterbridge to the receivers. The EAT considered the wording of Regulation 3(1)(b) which says that a service provision change occurs where activities cease to be carried out on a client's behalf and are instead carried out by a subsequent contractor on the client's behalf. The EAT concluded that this must be a reference to the same client and in this particular case the assets (the properties) had changed hands and the client was not the same. The Court of Appeal agreed.

Employment tribunal reform
The UK's Coalition Government expressed a desire when they came to power to reform the way employee and employer disputes are handled by the employment tribunal. They wish to reduce the number of claiming being handled by the employment tribunal system and ensure that those claims that are heard are dealt with more efficiently.

As part of this drive since 6 April 2012 new joiners with any organisation need to be employed for two years before they can bring an unfair dismissal claim. There is no doubt that this should reduce the number of unfair dismissal claims bought by employees, However, before April 2012 it was the case that if an employee did not have the qualifying service to bring an unfair dismissal claim they would instead bring a claim which requires no service such as discrimination or whistle blowing. There is no cap on the compensation that can be awarded for discrimination or whistleblowing claims so to reduce these risks employers need to be thinking about:

- ensuring relevant policies are followed to prevent any allegations of less favourable treatment and that employees who blow the whistle are taken seriously;
- adopting a consistent minimum process for dismissing employees who cannot bring an unfair dismissal claim, while not losing the advantage of having more flexibility. One possible solution is reintroducing probation periods. Larger organizations may want to consider issuing some HR guidelines for managers;
- dealing with any performance management concerns promptly to prevent employees thinking they are doing well and then when they are told they are not looking for another reason for their treatment.

The increasing use of social media
Social media presents both great opportunities and great challenges for business. On one hand the opportunities to draw a wider pool of candidates, promote products, services and brand are endless, on the other the potential for misuse of social media in the workplace and beyond and damage to reputation. Employees' use of social media can create reputational risk for an employer. For example, an employee

posting critical comments about his employer or clients on Facebook or perhaps an employee publishing controversial opinions or defamatory comments about a third party on a business networking page which can be linked back to the employer. In the past year or so cases have started to be determined which give employers guidance about how employers can try to limit that risk.

The cases show that an employer can take appropriate action where an employee's use of social media has the potential to cause damage to its reputation. However, a key and perhaps overlooked point is that the action should be proportionate taking account of the reality of the situation including the seriousness of the damage, the actual and potential readership of the post in question. This was illustrated by the High Court's decision in a case involving Facebook postings about gay weddings in church.

Smith v Trafford Housing Trust

In this case a housing manager was demoted, and lost 40% of his salary over time, after he made a remark on his personal Facebook page, which was not visible to the general public, in his own time on a Sunday morning, that gay weddings in church were "an equality too far". In response to this one of his Facebook friends, who was also a colleague, asked him for his views about gay marriage. He said in reply that the bible is specific that marriage is between men and women and that the state should not impose gay marriage on places of faith. For making those two comments he was suspended, subjected to disciplinary proceedings and in the end told he was guilty of gross misconduct and deserved to be dismissed. However, as a result of his loyal record of service he was demoted with a 40% reduction in pay phased in over 12 months, which was increased to 24 months following an appeal. He was too late to bring claims for constructive dismissal in the employment tribunal so issued proceedings for breach of contract in the High Court.

During the High Court proceedings his employer, a housing trust, maintained that making the two postings on his Facebook page, which identified him as one of its managers, meant that he had brought the employer into disrepute. They also said that the claimant had committed breaches of the Trust's code of conduct and acted contrary to its equal opportunities policy by promoting his religious beliefs to colleagues, not least because one colleague found his posting homophobic. The High Court did not agree. It found that no reasonable person would think the claimant was expressing views on behalf of his employer: a brief mention of the identity of his employer was in no way inconsistent with the general impression that Facebook was for personal and social information. Furthermore, they found that by answering a question posed by a colleague he was not promoting his religious beliefs and that the equal opportunities policy and code of conduct did not apply to the exchange that occurred outside work. To hold it did apply would be too much of a fetter on the right of freedom of expression. The judge also noted that in any event the claimant's response to his colleague used moderate language in a respectful manner and as such his colleague, in taking his comments to be homophobic, was not adopting a reasonable interpretation. The judge therefore held that the Trust did not have a right to demote the claimant because he had wrongly been found guilty of gross misconduct and as such they had committed a serious and fundamental breach of contract.

This case makes it clear that a work related context will not easily be assumed. Had the claimant sent an email to his colleagues at work, or posted these comments on the employer's Facebook wall the outcome is likely to have been different. The decision is also very realistic, noting that diversity is a concept which by its very nature may involve differences of opinion which may not be reconciled. However, employers who wish to try to take any action against employees who allegedly bring them into disrepute, as a result of social media use outside of work, need to ensure that their policies are very clear about what is, and what isn't permitted.

Legislative developments to watch carefully in 2013

Implementation of the Revised Parental Leave Directive

In March 2010, the EU increased parental leave entitlement from three to four months. The government confirmed that it would implement this by means of new regulations to take effect in March 2013. The

new regulations will increase the amount of unpaid parental leave that can be taken per child from 13 to 18 weeks. Unpaid parental leave will continue to be limited to a maximum of four weeks per year.

The new regulations will mean, flexible parental leave being taken by each parent either consecutively, or by both parents concurrently, as long as the combined amount of leave does not exceed the amount which is jointly available to the couple.

There will be a further consultation on the administrative details of the new system in 2013.

The Growth and Infrastructure Bill 2012-13 is planned to come into effect introducing the concept of employee shareholder status

On 8 October 2012, the Chancellor announced controversial plans for a new type of employee ownership arrangement, under which employees would give up some of their employment rights in exchange for shares in the company. An employer and employee will be able to agree from April 2013 that, in return for the individual being an "employee shareholder" (instead of just an "employee"); the company will issue or allot a minimum of £2,000 worth of shares to the individual. The employee shareholder would have the same rights as an employee except for:

- No right to request time off for study or training.
- No right to make a flexible working request.
- No right not to be unfairly dismissed (except in health and safety cases, automatically unfair cases, or cases where the dismissal is discriminatory).
- No right to a statutory redundancy payment.

The employee must give 16 weeks' notice if they want to return early from statutory maternity, adoption or additional paternity leave.

The proposal raises many potential legal and practical issues for employers. It has already created a variety of media comment. Our view is the proposal will not have an immediate wide impact, but could become an important aspect of tax and employee equity planning for some employers. Shares for rights may seem particularly attractive to employees who do not feel they need unfair dismissal or redundancy protections and are keen to have tax-efficient equity participation in their employer.

Collective redundancy consultation to be halved to 45 days

The government announced In December 2012 that it intends to change the rules relating to large scale redundancies, including reducing the 90 day consultation period to 45 days. This is applicable where employers are proposing to make 100 or more redundancies at one establishment. Where between 20 and 99 redundancies are proposed the current consultation period of 30 days will remain unaffected.

The government plans also set out that fixed-term contracts would be excluded from collective redundancy consultations when they expire at the end of their agreed term. This issue has been the subject of much legal uncertainty. The government will be utilizing an exemption allowed for in the EU Directive on Fixed-term Work. This should assist employers, particularly those in the education sector, who are often required to engage in rolling consultation in order to comply with the current consultation obligations.

The trade unions have accused the government of making it easier to sack people whereas the reduction in the consultation period is likely to be welcomed by most large employers – albeit that some would have preferred it to be reduced further, to 30 days for all collective redundancies. In 2012 we sent out a survey to gather evidence from our clients to help shape any proposals for amendments to the collective redundancy consultation and TUPE rules. 80% of respondents to our survey told us that a period of between 30 to 45 days would be more appropriate / workable than the current 90 day period. The concern was that the current 90 period gives rise to consultation fatigue, additional costs, uncertainty for employees and unprofitable delays. In line with our survey results, the CBI has responded to the announcement by highlighting that: "The priority for businesses is meaningful consultation. A shorter

consultation period will reduce uncertainty for staff and allow businesses to focus on the future more quickly."

In addition 70% of respondents said that fixed term contracts should be excluded from the collective consultation rules.

New strategic report requirements

In October 2012, the draft Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 was launched and are scheduled to take effect in October 2013. The proposed changes include the abolition of the business review, and its replacement with a new requirement for companies to produce a standalone strategic report. For quoted companies only, (among other things) the strategic report will have to include separate entries stating the number of persons of each sex within a company who are, respectively, directors, managers (other than directors) and employees

The new strategic report is significant because it must be filed at Companies House, liability for false or misleading statements in reports will extend to a strategic report, and the auditor's report on a company's annual accounts must also relate to information in the strategic report.

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Ireland

Abolition of Redundancy Rebate
Following the Budget for 2013 the longstanding redundancy rebate has been discontinued. The rebate related only to the *statutory* element of redundancy payments. Most employees who are made redundant in Ireland are entitled to a statutory payment based on two weeks' pay for each year of service capped at €600 per week. To qualify employees must have continuous and reckonable service of at least 104 weeks. This development will not be welcomed by employers already feeling the increased cost of implementing redundancies in light of 2012's reduction of the rebate from 60% to 15%. Employers now bear the whole cost of making redundancies. In addition to statutory payments it has been common, although by no means compulsory, for employers in Ireland to top up redundancy packages, usually in return for a comprehensive waiver from the employee covering *all claims.* This practice has been affected by the economic downturn and will no doubt be further impacted by this latest development.

"Corporate Bullying" and Psychiatric Injuries
An important judgment delivered in January 2012 established that actions arising from workplace bullying are not restricted to individual conduct but also extend to "*corporate bullying*". In ***Kelly -v- Bon Secours Health System Limited [2012] IEHC 21*** the Court awarded significant damages for psychiatric injury caused by hostility and adverse treatment found to have been directed by management. The Court also arguably extended the circumstances in which a vulnerability to stress will be taken to be foreseeable*,* one of the key tests for these types of cases. In addition, its award of damages was for "*severe distress and insult"* which arguably departs from the previously held view that such an award requires there to be a *recognized psychiatric injury*. This case should be of interest to all employers and insurers.

Industrial Relations (Amendment) Act 2012 (No 32 of 2012)
This legislation is of relevance to a number of industries, for example, within the retail and leisure and construction sectors. Joint Labour Committees and Registered Employment Agreements are two mechanisms in Ireland for incorporating minimum terms and conditions in to employment contracts in the affected industries. Those mechanisms were criticized as being both out of touch and unfair on employers. Following the initiation of several High Court challenges, the Joint Labour Committee wage setting mechanism was declared in 2011 to be unconstitutional (***John Grace Fried Chicken Ltd & Ors v Catering JLC & Ors****)*. Partly as a consequence of that judgment the new Act came into force on 1 August 2012 and made significant changes to the wage setting mechanisms. These include, for example, mandatory consideration of eight economic and industrial relations factors and the ability of employers to temporarily derogate from minimum provisions in case of financial difficulty.

Reform of Employment Law Dispute Resolution Procedures
Ireland's employment law regime is in the process of radical change. Similar to most jurisdictions, Ireland has in place a complex and dynamic regime governing the employment relationship. It is governed by statute, the Irish constitution, European Union law and, as in the United States and the United Kingdom, the common law. Therefore, employees may bring proceedings in the Courts and statutory claims and sometimes both. Statutory protections include both substantive rights, for example, relating to wages, working time and protection from various types of discrimination, and also the right to fair procedures. These protections are always evolving.

The proposed reforms relate to the statutory dispute resolution procedures. Currently, an employee in Ireland can initiate employment-related claims, and appeals, in various forums depending on the nature of the alleged breach and the applicable statute. Statutory claims may variously involve the Labour Relations Commission, the Labour Court, the Employment Appeals Tribunal, and the Equality Tribunal.

Virtually all practitioners recognize the need for an improved statutory system which reduces costs and delays. Proposals to simplify this regime have been published and the process of reform has commenced. The goal of having only one entry point has already been progressed with the introduction in

January 2012 of a new integrated claim form. An *Early Resolution* pilot scheme also introduced in 2012 has reportedly yielded positive results.

The core reforms are expected to be progressed in 2013 with the introduction of only one body dealing with employment rights issues at the first instance and only one body to hear appeals. There remains the possibility of appeals on a point of law to the High Court.

The proposals have proved controversial in employment law circles. Key areas of the debate have been whether or not the holding of first instance hearings in private is constitutional and human rights compliant. In addition, there has been much debate about selecting and resourcing the appellate body. Arguably, to maximize the benefits of procedural reforms, they should be progressed only as part of a larger consolidation of employment legislation.

Protection of Employees (Temporary Agency Work) Act 2012 (No 13 of 2012)

The Act gave effect to an EU Directive requiring that agency workers, in respect of their basic working and employment conditions, are treated equally to direct recruits of the end-user.

The new protections apply to individual agency workers who are temporarily assigned by an employment agency to work for, and under the direction and supervision of, an end-user. Managed service agreements are outside the scope of the Act.

Most of the provisions of the Act became law in 16 May 2012. However, the equal pay provisions operate retrospectively to 5 December 2011. The guarantee of equal pay to direct hires encompasses *basic pay* and a limited number of other types of payment, for example, overtime. It does not include sick pay or payments under pension schemes and various other payments fall outside *basic pay*.

Bonus Payments

Early in 2012 the High Court delivered a key judgment relating to discretionary bonus schemes. The case arose from challenges by two former employees. The defendant bank amended its deferred incentive and reward scheme. It introduced deferred cash in substitution for deferred stock as it had become no longer possible to award stock. The scheme stated that awards were discretionary. The vesting of the award, both prior to and subsequent to the change, required the employee to remain in employment for a number of years. The Court found in favour of the bank. It confirmed that the applicable test was that *no reasonable employer would have exercised its discretion in that manner*. The judgment will be of comfort to employers in Ireland operating deferred bonus schemes.

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Spain

In February of this year the Royal Decree-Law 3/2011 was processed in parliament as an urgent law with a view to making changes to Spanish labour legislation to increase flexibility in the Spanish labour market. This law went afterwards through a Parliamentary process to become an ordinary law, (Act 3/2012) brought into force on 6 July. We highlight some of the main changes.

I.- Collective Dismissals

- The grounds for carrying out redundancies (economic reasons, technical reasons, organizational reasons, and production reasons) have been redefined so to make it less difficult for companies to prove them.

- The requirement to obtain official authorization from the labour authority for collective redundancies has been removed, as such, the reasons for dismissal and the dismissal procedure itself are to be monitored solely by the labour courts.

- In place of the previous 'social plan' companies now have an obligation to offer an outplacement plan to the affected workers where the number of workers affected is more than 50. This is carried out through authorized outplacement agencies for a minimum period of six months.

- <u>Impact on redundancies of Spanish Case law on "labour group of companies":</u>

  The Spanish Courts have created the concept of a *"labour group of companies"* . The implications of being considered as such a group are:

  a) All compulsory information which should have been provided during the redundancy process must include information about the group companies as well as the employing company. This is the case even if the subsidiary of a group is not in possession of all documents and information relating to its group companies. Failing to identify yourself as a labour group of companies at the outset may mean that at the end of the process you have failed to comply with your obligations on providing information and on consultation. There are a number of recent judgments by higher courts declaring collective redundancies null and void (which involves having to reinstate affected employees!) because of this.
  b) Decisions undertaken at group level to improve the organisation or its efficiency (such as relocation of factories to lower cost locations) are not deemed a sound cause to justify lay-offs locally because the need to take such measures is judged by reference to the performance of the group, rather than the individual company.

Group companies are likely to be found to be a labour group of companies is at least some of the following four criteria apply:

a) There is a unified management – indicators might include the employees of subsidiaries having a reporting line to managers in other companies.

b) There are employees who work not only for one company of the group but also for others whether simultaneously or in a successive way (for instance, the group has an expatriation policy that encourages temporary assignments from one company to another abroad).

c) There is a single economic interest - for example, subsidiaries benefit from services from the parent company that are not charged, or are charged at below market rate.

d) The Companies have the same external appearance to employees and/or the market, for instance brand, logo, webpage, corporate policies or bonuses connected to the results of the group.

The issues outlined above can make a redundancy process more expensive or jeopardize the validity of the redundancy process and the validity of any dismissals. It is therefore essential that companies belonging to larger corporate groups are aware of these issues and adopt a strategy to control risk.

II.- Protection on behalf of elder employees against termination of employment

Recent labour reforms have sought to discourage companies from terminating the employment of older workers:

- It is now forbidden to include in collective bargain agreements clauses allowing employers to terminate for free employees when they reach the retirement age (which is now 67).

- Where workers over the age of 50 are dismissed within the scope of a collective redundancy processes or otherwise, certain categories of company are required to make payments to the Spanish Treasury to partially or fully compensate for the cost of providing unemployment benefits to workers over 50.

  (i) those that have been for the previous couple of tax years in profit ***or belong to a corporate group in profit***; and
  (ii) where the staff of the company **or *of the group*** exceeds 100; and
  (iii) there is a collective redundancy where any employee over 50 is affected.

  A further relevant issue is that, once the rule actually applies, contributions must be made for other employees of the company ***or of the group*** who have been terminated in the three years preceding , the collective dismissal or who will be terminated in the three years following the collective dismissal, even where they have been terminated outside the scope of the collective redundancy.

  The current impact of these rules (which were introduced last year but have been recently toughened with the labour reform Act of July 6th 2012) has been to discourage employers from dismissing older employees, but unluckily has also discouraged companies from hiring workers close to 50.

III.- Effects of unfair dismissal

- Where a dismissal process is declared unfair the usual level of compensation has been lowered from 45 days of salary per year of service with a cap of 42 months, to 33 days of salary per year of service with a cap of 24 months (although both rules will have to be combined in respect of contracts entered before February 11th 2012).

IV.- Substantial changes of working conditions

- It is now easier for an employer to change the existing terms and conditions of employment of their workforce, even unilaterally. As long as the company is able to prove the existence of an economic, technical, organizational or production reason for the change it will be allowed, and the situations that will fall under these reasons are defined and are much less onerous than before, an example of an economic reason being two consecutive quarters of diminishing turnover only.

- The terms that can be altered include geographical mobility, working time, functions and, for the first time, an employee's rate of pay.

V.- Collective Bargain Agreements

- In a number of matters, company collective bargaining agreements can deviate from the applicable industry-wide collective bargaining agreement.

- Another possibility is to reach a dis-apply agreement in respect of certain matters ruled by the applicable collective bargain agreement. This possibility requires the existence of causes (economic

reasons, technical reasons, organizational reasons, and production reasons) and when the agreement cannot be reached, either party can refer the dispute to the National Advisory Committee on Collective Bargaining Agreements, or the equivalent regional body, whose decision shall be effective and binding.

These changes clearly give Spanish companies a new opportunity to review their workforce and employment conditions and restructure their business so their human resources are utilized in the most efficient way.

Obviously, the Spanish trade unions oppose the new rules as they are well aware that their position has been seriously weakened and they feel that many of their all achievements on behalf of the workers have been lost.

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United States - Federal

Case Law

FMLA Interference and Retaliation

***Donald v. Sybra, Inc.*, 667 F.3d 757 (6th Cir. Jan. 17, 2012)**
Plaintiff worked as an assistant manager in an Arby's restaurant. Following approved FMLA leave in 2007, Donald's supervisor noticed a series of register drawer irregularities during Donald's shifts. Her supervisors listened to customer orders and compared the charges with those in the drawer. While the incident was under investigation, Donald alleged that one of her supervisors, cognizant of her health problems, said that "she should be disabled."

Donald shortly thereafter notified her supervisor she would not be able to return to work and provided neither a formal written notice nor a request for FMLA leave. Upon her return, the supervisor confronted Donald about the drawer shortages. Donald denied all allegations and refused to sign a written waiver form acknowledging the theft. Defendant terminated Donald's employment. Donald sued for disability discrimination under the ADA and Michigan state law, and retaliation in violation of Family Medical Leave Act.

In affirming summary judgment against Donald, the Sixth Circuit clarified the proper standard of proof for FMLA interference claims by applying the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*. In doing so, the Sixth Circuit found insufficient evidence (i.e., the temporal proximity and isolated remark) to support Donald's allegations of retaliation or discrimination. Donald failed to meet her burden that Defendant's justification for her termination —theft—was pretextual. The court employed the honest belief rule, reasoning that it is not in the interests of justice for the court to venture into the employer's decision-making process.

<u>FMLA termination – Bad Faith or Permitted</u>

***Thom v. Am. Std., Inc.*, 666 F.3d 968 (6th Cir. Jan. 20, 2012)**
In an appeal from partial summary judgment awarded to plaintiff on his FMLA interference claim, the Sixth Circuit not only affirmed judgment in favor of plaintiff, but granted liquidated damages (double damages) permitted for bad faith discharge. The plaintiff was a longtime employee who took FMLA leave because of a non-work related shoulder injury. Leave was initially granted from April 27, 2005 until June 27, 2005, but his shoulder recovered faster than expected, and plaintiff attempted to return to light duty on May 31, and set June 13 as the date for resuming full duty. Plaintiff was sent home because the employer did not permit light duty for non-work related injuries. On June 14, plaintiff was contacted by human resources because he failed to show up for work. He said that his shoulder was painful and he would return on June 27, the end of his approved leave period. Plaintiff attempted to get a doctor's note, but was unable to do so until June 17. At that time, he went to work with a note requesting an extension of the leave period until July 18; however, by the time he did so, the employer had already terminated him by counting June 13 through 17 as unexcused absences. (June 13 was the expiration of plaintiff's maximum FMLA leave period based on a "rolling" method of calculation.)

The Sixth Circuit found that the employer did not adequately communicate its methodology used to calculate FMLA leave, noting that employees should be notified in writing and the employer initially granted leave until June 27. After affirming awards of attorneys' fees, costs, and back pay, the Sixth Circuit also levied liquidated damages because the employer's "after-the-fact reliance on the rolling method . . . was a pretextual reason never raised . . . before the discharge."

***Winterhalter v. Dykhuis Farms, Inc.*, 2012 U.S. App. LEXIS 15305 (6th Cir. July 23, 2012)**
Defendant Dykhuis Farms terminated plaintiff's employment on the day that he was scheduled to return from FMLA leave. The termination was premised on economic hardship and plaintiff's status as the highest-paid but lowest-performing of the workers in his unit. In affirming summary judgment awarded in

favor of Dykhuis Farms, the Sixth Circuit found that the farm had legitimate reasons unrelated to the exercise of FMLA rights for plaintiff's termination. Namely, there was substantial evidence of financial hardship and plaintiff's high pay combined with poor performance. Plaintiff was unable to demonstrate that these stated reasons were pretextual under the *McDonnell Douglas* burden-shifting framework.

Requirements for FMLA leave – Proper Medical Certification

***Huberty v. Time Warner Entertainment Co.*, 2012 US Dist. LEXIS 15571 (N.D. Ohio Feb. 8, 2012) & *Poling v. Core Molding Techs.*, 2012 U.S. Dist. LEXIS 16427 (S.D. Ohio Feb. 9, 2012)**
Ohio District courts addressed the requirements for an employee to provide proper medical certification to qualify for FMLA leave.

In *Huberty v. Time Warner*, Plaintiff Scott Huberty worked as a warehouse driver. In 2008, he allegedly approached a supervisor about taking time off because of stress in his life. He began taking time off and searched for a doctor to certify his medical condition. Time Warner subsequently terminated Huberty because during his leave he was absent for three consecutive days and failed to call off on all three days in violation of company policy. Huberty brought suit for FMLA interference and retaliation claims, unjust enrichment, and breach of implied contract.

Huberty concedes he never saw a doctor prior to taking leave from employment and that it was nearly a year after his termination before he ever sought treatment for an alleged serious medical condition. The district court found that Huberty did not demonstrate that he had a serious health condition because his testimony, standing alone, is insufficient to demonstrate such a condition. In addition, the court noted that Time Warner is permitted to enforce reasonable requirements of its sick leave policy while an employee is on, or seeking, FMLA leave. Because Huberty did not call off in accordance with policy, his employment was properly terminated.

Likewise, in *Poling v. Core Molding*, the plaintiff was a member of the a union with a collective bargaining agreement that included an attendance provision allowing for a certain number of unpaid days off resulting from unexcused absences and tardiness, but once an employee exhausted the allotted number of unpaid days off, further unexcused absences could result in termination. The plaintiff was granted intermittent FMLA leave to treat a condition known as Reflex Sympathetic Dystrophy Syndrome ("RSD"). The plaintiff did not take FMLA leave for a few months, but then called off, indicating only that he was off for FMLA purposes. The employer sent a letter informing plaintiff of his FMLA eligibility, but also requested medical certification for his absence, warning that failure to comply could result in violation of attendance policy because the plaintiff had used all of his unpaid leave. The plaintiff failed to provide adequate medical certification despite being given multiple chances to do so and was terminated. The court granted summary judgment in favor of the employer because a certification from the employee's health care provider can be required by the employer. Failure to provide certification disqualifies an absence as FMLA leave, and the employer was entitled to enforce its attendance policy.

Aggregate Hostile Work Environment

***Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714 (6th Cir. Feb. 24, 2012)**
Eleven current and former African-American employees of defendant brought suit alleging that they were exposed to a racially hostile work environment. The plaintiffs claim events over the course of twenty-five years form the basis of their hostile work environment claims, included vulgar graffiti, overtly racist comments by coworkers, and racially motivated pranks. Although the court found these incidents reprehensible, the Sixth Circuit affirmed summary judgment against the plaintiffs because the events did not amount to a hostile work environment. In doing so, the Sixth Circuit clarified that the "totality-of-the-circumstances" test used in hostile work environment cases can be based not only on what the plaintiff employee actually experiences, but also on what the employee is aware of. However, considering the claims of all employees in the aggregate is not proper under the test.

Disability Discrimination

***Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. May 25, 2012)**

Plaintiff Susan Lewis worked as a registered nurse for one of defendant's retirement homes. Lewis suffered from a medical condition that made it difficult for her to walk and that occasionally required her to use a wheelchair. Lewis alleged defendant fired her because of this medical condition, and she filed a suit alleging ADA discrimination.

Defendant urged that the proper causal test required plaintiff to prove that defendant's decision to fire her was "solely" because of the disability. Plaintiff urged the court to apply the "motivating" factor test. The district court instructed the jury on the "solely" test. On appeal, the Sixth Circuit found that neither test was appropriate; instead, the applicable statutory language requires a "but for" test of causation in ADA cases. As such, the case was remanded for a new trial because of the improper jury instructions.

Gender Discrimination under Mixed Motive Analysis

***Ondricko v. MGM Grand Detroit, LLC*, 2012 U.S. App. LEXIS 16433 (6th Cir. Aug. 8, 2012)**

Plaintiff Kimberly Ondricko supervised black jack tables in a casino operated by Defendant MGM Grand Detroit. A dealer under Ondricko's supervision misdealt the cards in a "bad shuffle," and after investigation MGM fired Ondricko.

Ondricko brought a claim for gender and race discrimination under Title VII and Michigan state law. The district court granted summary judgment in favor of MGM, finding that Plaintiff admitted the conduct that resulted in her termination, and that there was no evidence of more favorable treatment for other similarly situated employees. The Sixth Circuit reversed. It applied a mixed-motive analysis, noting that Ondricko presented sufficient evidence that MGM was motivated by a desire to be racially balanced in its terminations for misconduct related to shuffling. Ondricko presented evidence that four similarly situated male employees who were not terminated based on similar conduct, and MGM was unable to defeat the inference of discriminatory motive.

Fair Labor Standards Act

***Frye v. Baptist Mem. Hosp., Inc.,* 2012 U.S. App. LEXIS 17791 (6th Cir. Aug. 21, 2012)**

Plaintiff James Allen Frye filed a collective action under the Fair Labor Standards Act ("FLSA") against his former employer. Specifically, Frye alleges the employer failed to pay its employees for all hours worked as well as failing to provide overtime compensation. The Sixth Circuit found that the decision to decertify the class was appropriate because an automatic pay deduction policy for unpaid meal breaks with an exception for time worked during the breaks is not a *per se* violate the FLSA. The employer was not precluded from using an automatic-deduction policy as doing so, without more, does not offend the FLSA.

Medical Marijuana

***Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. Sept. 19, 2012)**

In reaffirming Wal-Mart's successful motion to dismiss for failure to state a claim, the Sixth Circuit found that the Michigan Medical Marijuana Act ("MMMA") does not regulate or restrict private employers such as Wal-Mart. It therefore did not protect plaintiff Joseph Casias, a Wal-Mart employee authorized to use marijuana for medical reasons under the MMMA, from termination after he violated company policy by failing a drug test. Casias maintained that he complied with state laws and never used marijuana while at work, nor did he come to work under the influence of marijuana. Still, because the MMMA only provided a potential defense to criminal or adverse action by the state, it did not insulate Casias from adverse employment action imposed by a private employer for violations of drug policies.

Disability and entitlement to benefits

***Core v. Champaign Cty. Bd. Of Cty. Commrs.*, 2012 U.S. Dist. LEXIS 149120 (S.D. Ohio Oct. 17, 2012)**

Plaintiff was hired by Champaign County Department of Jobs and Family Services ("DJFS") as a Social Service Worker. She suffers from asthma and a severe chemical sensitivity to certain perfumes and other scented products. After numerous episodes, DJFS sent a work-wide email to its staff informing them of plaintiff's reaction to specific scents and requested that they limit coming into contact with her. Even so, plaintiff went on leave and requested an accommodation of working from home or, alternatively, a fragrance free workplace.

In response, DJFS proposed allowing plaintiff's use of an inhaler at work, allowing plaintiff to go outside to alleviate any symptoms as often as necessary, to consider any recommendations of a pulmonologist or recommendations based on the results of a methacholine challenge or provocation challenge, and sending an email to staff requesting that they refrain from wearing specific perfumes while at work. DJFS also proposed posting the email at locations throughout its facility.

The court granted judgment as a matter of law in favor of DJFS on plaintiff's ADA claims because the accommodations proposed by DJFS were reasonable while plaintiff's demands for a totally fragrance-free workplace were not.

Pregnancy Discrimination & FMLA Interference

***Alexander v. Trilogy Health Services*, 2012 US Dist. Lexis 152079 (S.D. Ohio Oct. 23, 2012)**
Plaintiff Tasha Alexander worked for Trilogy as a licensed practical nurse at a residential care facility. She was suspended because of excessive absences after she became pregnant. Alexander brought claims for pregnancy discrimination under Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Chapter 4112; disability discrimination under the Americans with Disabilities Act and Ohio Revised Code Chapter 4112; and interference under the Family Medical Leave Act ("FMLA").

Alexander had a history of absenteeism, but had improved in that regard prior to her pregnancy. After she found out that she was pregnant, she had health complications (high blood pressure in pregnancy) and requested paperwork for FMLA leave. She was instructed to obtain paperwork from a website. Alexander did not submit paperwork, which Alexander claims was not available. In addition, Trilogy suspended her because she did not give required advanced notice of absences her health. After conducting an investigation, Trilogy determined that Alexander had abandoned her job because it never received FMLA paperwork and terminated her.

The District Court for the Southern District of Ohio found that there was sufficient evidence of pregnancy discrimination based on comments, pattern of treatment, and more favorable treatment of similarly situated non-pregnant employees. In addition, the court granted summary judgment in favor of Alexander on her ADA claims, because it was undisputed that she was denied a reasonable accommodation—namely, a short leave of absence—for her high blood pressure. Lastly, the court granted Alexander's motion for summary judgment on the FMLA claims, noting that the FMLA "does not require that employees apply for FMLA leave, it only requires that employees provide employers with sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." (Internal quotations omitted.) Alexander gave sufficient notice when she told a manager over the phone that she was unable to work because of elevated blood pressure. While an employee may be required to follow more onerous procedures for seeking leave, the employee must be given actual notice of the additional requirements in writing. Alexander was never provided written notice of the additional requirements, and thus she was entitled to be reinstated to her position after the conclusion of her leave.

FMLA Leave—Fraudulent Behavior

***Jaszczyszyn v. Advantage Health Physician Network,* 2012 U.S. App. LEXIS 23162 (6th Cir. Nov. 7, 2012)**
Plaintiff Sara Jaszczyszyn worked for defendant's Human Resource Department. Over a year-and-a-half span Jaszczyszyn took intermittent FMLA leave related to a prior existing injury sustained in a car wreck ten years before. Several coworkers saw pictures of her drinking at a local festival while on leave. After

an internal review including a meeting with plaintiff wherein plaintiff could not offer a satisfactory explanation for the pictures, defendant terminated plaintiff's employment for fraud.

In upholding summary judgment in favor of defendant, the Sixth Circuit used the "honest belief" rule (so long as the employer honestly believes in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless) and applied the *McDonnell Douglas* burden shifting analysis to plaintiff's FMLA retaliation claim. Defendant demonstrated an "honest suspicion" that plaintiff abused her leave. Defendant presented evidence that it had legitimate reasons unrelated to the exercise of FMLA rights for terminating the employee.

I. STATUTORY DEVELOPMENTS

A. GINA Recordkeeping Requirements

Effective April 3, 2012, new recordkeeping requirements apply to entities covered by the Genetic Information Nondiscrimination Act (GINA). New regulations impose the same retention requirements under GINA that currently apply under Title VII and the Americans with Disabilities Act (ADA). While the final regulations require employers to maintain the records they create, they do not require employers to create additional documents, nor do they impose any reporting requirements under GINA.

B. New ADEA Regulations

On March 30, 2012, the EEOC published new regulations under the Age Discrimination in Employment Act (ADEA) in response to rulings by the Supreme Court.

In disparate impact cases, an employer does not have to prove business necessity for its practice; it need only prove that the practice was based on a Reasonable Factor Other than Age (RFOA). Employment practice is based on RFOA when reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers.

C. Dept. of Labor Proposes Amendments to FMLA Regulations

On January 30, 2012, DOL published proposed amendments to the Federal Family and Medical Leave Act (FMLA). Regulations are to include qualifying exigency leave for members of the military and their family members; coverage for serious injuries and illnesses of service members; confidentiality requirements under GINA; and hours of service requirements for airline flights crew members.

D. Fair Credit Reporting Act:

If you're performing background checks on employees, it's important you know that due to the Dodd-Frank Act and the new Consumer Financial Protection Bureau some of the forms associated with the Fair Credit Reporting Act change as of the first of the year. To comply with the new requirements, the following forms must be replaced no later than January 1, 2013: "A Summary of Your Rights Under the FCRA, Obligations of Users Under the FCRA, Obligation of Furnishers Under the FCRA."

E. Patient Protection and Affordable Care Act.

1) If an employer issues more than 250 W-2 forms, they will need to start reporting the total cost of employer-sponsored health coverage on the forms for the 2012 calendar year, which you issue in January 2013.

2) In 2013, a cap of $2,500 goes into effect on contributions made to a Flexible Spending Account (FSA). And for your higher earners with wages in excess of $200,000, Medicare payroll taxes will increase to 2.35%.

3) Starting in July 2013, a $1.00 fee per employee if the employee offers a health plan, HRA, or maybe even an FSA. This fee will go up to $2.00 per employee in 2014, and will be in effect for at least the next seven years.

4) The other important factor to be aware of is that a company's headcount during 2013 will become the basis for determination if the employer is required you to either provide health care coverage to employees or pay a fine. The bar is 50 full time employees, but keep in mind that hours for part-time employees are added together and divided by total headcount. Plus, the PPACA defines a full time employee as working 30 hours or more per week.

F. Wage & Hour :

2013 Minimum Wage remains at $7.25/hr. however The Catching Up to 1968 Act of 2012 (HR 5901) was introduced last year . This bill would increase the federal minimum wage to $10 per hour and index future increases to those in the CPI. Representative Jesse Jackson Jr., who sponsored the bill, indicated that the minimum wage, in 1968 dollars, would be closer to $11 per hour today.

G. NLRB & Social Media

The Acting General Counsel of the National Labor Relations Board (NLRB) issued reports on the legality of handbook policies within the context of employee Section 7 NLRA rights. The first two reports discussed NLRB cases arising in the context of employee communications via social media, and in its last report addressed social media policies that violate Section 7 of the NLRA which protects the right of union and non-union employees to engage in "concerted activities" with each other for the purpose improve working conditions and terms of employment.

H. Pending legislation:

1. The Fair Minimum Wage Act of 2012 (S 3453 and HR 6211), was introduced on July 26, 2012 increase the minimum wage, subsequently making increases consistent with inflation. Senate Bill 3453 was referred to the Committee on Health, Education, Labor, and Pensions, while House Bill 6211 was referred to the House Committee on Education and the Workforce on July 26, 2012. They remain there.

2. Immigration Reform – The President is expected to push a more comprehensive reform package.

3. Workplace Discrimination – Both parties will push equal pay for women in the workplace. Also, the possible passage of the Employment Non-Discrimination Act, an Act that prohibits discrimination against workers on sexual orientation.

4. Workplace Leave – Possible expansion of the current Family and Medical Leave Act (FMLA), to include provisions of expanding leave options.

5. Labor Relations – Possible passage of the Employee Free Choice Act (EFCA).

6. Password Protection Act of 2012- would prohibit employers from requiring an employee to provide access to any information stored on a computer when the information isn't owned or controlled by the employer. The measure also protects prospective employees by prohibiting employers from requiring disclosure as a condition of employment. Finally, the bill addresses retaliation and discrimination by prohibiting employers from taking an adverse action against an employee who refuses to disclose personal password information. If the bill passes, employers that violate the Password Protection Act could face financial penalties.

II. JUDICIAL PRONOUNCEMENTS

A. Discrimination

1. Title VII

a. Love v. Tyson Foods, Inc., 2012 WL 110096 (5th Cir. 4/4/12) - Title VII suit properly dismissed due to failure to disclose claims in bankruptcy. Judicial estoppel applicable as plaintiff couldn't show failure to apprise bankruptcy court about claims inadvertent.

b. Abner v. IDOT, 673 F.3d 716 (7th Cir. 3/21/12) - State agency employee was fired and challenged discharge through admin. proceeding alleging no just cause. Claim was not successful. At no time during the admin. process did he argue real reason for termination was to retaliate against him because he had filed a charge of race discrimination. After, he filed Title VII retaliation claim. District Court dismissed on grounds of res judicata and holding affirmed by appellate court. Retaliation could have been raised as a defense in earlier proceedings but was not.

2. Religion
a. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (1/11/12) - 1st Amendment's Establishment and Free Exercise Clause prohibits a teacher in a Lutheran church school from pursuing an employment discrimination claim against the church because she was a ministerial employee.

b. Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc., 2012 WL 745282 (1st Cir. 3/8/12) - S.J. against Seventh Day Adventist who claimed inadequate accommodation - employer offered two positions that did not require Saturday work and allowed employee to swap shifts.

c. Walden v. Center for Disease Control & Prevention, 669 F.3d 1277 (11th Cir. 2/7/12) - Court addressed extent of employer's obligation to provide employees with religious accommodations under Title VII. Court held employer only obligated to offer a reasonable accommodation and is not required to prove alternative accommodations proposed by employee would constitute undue hardship for the employer. Employee assistance program counselor refused to provide counseling to employee in a same-sex relationship as counselor described herself as a devout Christian who believes it to be immoral to engage in same-sex sexual relationships and that her religion precluded her from encouraging such a relationship. CDC removed plaintiff from position but offered to find her another job within company that would not conflict with her religious beliefs. Plaintiff declined to consider other positions and filed suit claiming religious discrimination under Title VII. District Court granted SJ for CDC, holding plaintiff provided reasonable accommodation as a matter of law that she declined to accept.

3. Race
a. Nassar v. Univ. of TX SW Medical Center 2012 WL 745296 (5th Cir. 3/8/12) - Dr. Of middle eastern descent harassed on the job and quit - no constructive discharge found. Evidence of racial harassment, viewed in light most favorable to him, established no more than minimum required to prove hostile work environment, but proof of more extreme behavior than that evidencing hostile work environment is needed to prove constructive discharge. Jury finding that he was retaliated against because his hiring by an affiliated hospital was blocked for his bias complaints was affirmed.

b. Hernandez v. Yellow Transportation, Inc.. 670 F.3d 644 (5th Cir. 2012) - SJ against Hispanic employees claiming hostile work environment affirmed. Only four incidents of racially motivated conduct over 10 years - incident involving knife threat by coworker not racial and cannot consider harassment of black employees to establish hostile environment against Hispanics. Cross-category evidence may be relevant if sufficient correlation but in this case incidents alleged were not physically threatening or humiliating to claimants.

c. Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012) - male-on-male harassment verdict reinstated since conduct sexual in nature. Homosexuality of harasser established because of sexually explicit emails; many complaints over a two-month period to management before HR informed; and HR's conclusion of insufficient evidence of sexual harassment supported jury's conclusion that employer didn't take prompt remedial action.

d. Good v. Univ. of Chicago Med. Ctr., 673 F.3d 670 (7th Cir. 3/12/12) Dist. Ct. didn't err in granting defendant-employer SJ in Title VII reverse discrimination claim alleging defendant terminated plaintiff on account of her white race. While plaintiff alleged defendant treated her more harshly than three co-workers of different race because, although she had demonstrated poor performance in current job, it allowed similarly poor performing co-workers to be demoted, as opposed to terminated, she failed to

link any harsh treatment to her white race, where record showed her replacement was white, and where she failed to show defendant had anti-white bias or history of discrimination against white employees.

e. Harris v. Warrick County Sheriff's Dept., 666 F.3d 444 (7th Cir. 2012) - SJ affirmed against discharged black probationary employee. Warrick County Sheriff terminated Harris's probationary employment as deputy sheriff based on violations of standard operating procedures, failure to follow orders, and insufficient commitment to the job. Harris sued under Title VII claiming he was fired because he is black. Court held Harris's circumstantial evidence of discrimination fell far short of supporting inference that he was terminated because of race. No evidence that sheriff or other decision-makers participated in any racially charged behavior. Although Harris identified several white deputies who were retained despite performance problems during probationary employment, their misconduct was not comparable to his, so cannot be considered similarly situated.

f. Hanners v. Trent, 674 F.3d 683 (7th Cir. 3/1912) - plaintiff alleged co-workers discriminated against him based on Caucasian race and political viewpoint by suspending him and giving him lower job evaluation after plaintiff sent email to certain co-workers that contained unflattering caricatures of women. 7th Circuit affirmed district court's granting of defendants' SJ as plaintiff failed to present evidence that any of his comparables were either non-Caucasian or had sent comparable emails to co-workers. Fact that no direct recipient of plaintiff's email filed complaint didn't require different result when employer's established procedure allowed supervisor to initiate investigation into plaintiff's conduct. Also, reduction in plaintiff's job evaluation could properly be attributable to content of plaintiff's email, as opposed to his race or political viewpoint.

g. Othman v. City of Country Club Hills, 671 F.3d 672 (3/1/12) - SJ affirmed against part-time police officer not hired for full time position. Alleged biased supervisor was police captain - but unbiased decisionmaker was police chief. Although captain conducted background investigation and provided recommendations, plaintiff failed to establish allegedly biased supervisor was a decisionmaker. Captain's discriminatory animus not a proximate cause of chief's decision not to consider part-time plaintiff for full time position.

h. Gibson v. American Greetings Corp., 670 F.3d 844 (8th Cir. 3/5/12) - SJ affirmed against African-American husband and wife who were both power truck operators. Both received extensive progressive discipline after receiving several warnings and then claimed racial discrimination and retaliation. Court upheld proposition that held when timing is only basis for claim of retaliation, and gradual adverse job actions began well before the protected activity, there is no inference of retaliation.

4. Gender-Based

a. Morales-Cruz v. Univ. of Puerto Rico, 676 F.3d 220 (2012) (1st Cir. 4/10/12) - Title VII suit against university and university officials for gender-based employment discrimination. District court's grant of defendants' motion to dismiss for failure to state a claim affirmed where the allegation that she was held to a different standard because she was a woman did not follow from any factual content set out in the pleading or any reasonable inference therefrom; and the complaint alleged no facts that would support an inference that the university acted on the basis of gender.

b. Gerner v. County of Chesterfield, 2012 WL 887597 (4th Cir. 3/16/12) - males and females terminated - female alleged comparable males were offered more attractive severance packages. District court dismissal reversed - there is no requirement that severance benefits be a contractual entitlement to be subject to the discrimination laws - viability of such claim depends on whether the benefit is part and parcel of the employment relationship. If so, it may not be doled out in a discriminatory manner.

c. Cook v. IPC Int'l Corp., 673 F.3d 625 (7th Cir. 2012) - Jury finding in defendant's favor in Title VII sexual discrimination termination and retaliation claims reversed. District court erred by charging the

jury to find single decisionmaker, where two different supervisors were involved, or else employee must prove existence of "sole decisionmaker."

5. Sexual Harassment

a. EEOC v. Great Steaks, Inc., 667 F.3d 510 (4th Cir. 2012) - EEOC sued for sexual harassment, but jury ruled against it. Equal Access to Justice Act (EAJA) provides that when a party is sued by the federal government it can recover its legal costs if the government action was not "substantially justified." Court determined it need not reach the issue as EAJA is not applicable to Title VII - has a savings clause which states it does not alter any other federal law that authorizes attorneys' fees. Therefore, a prevailing defendant can recover attorneys' fees under Title VII only if it meets the frivolous standard.

b. Crawford v. BNSF Ry. Co., 665 F.3d 978 (8th Cir. 2012) - Faraher/Ellerth defense upheld. Plaintiff contended employer's weak response to prior harassment complaints showed its policy was ineffective. In response to prior complaints, harasser not terminated but only counseled and required to attend seminar on harassment. Fact that employee would have liked harsher responses doesn't make policy ineffective. Employer's business judgment entitled to some deference with respect to how to handle complaints.

6. National Origin

a. Cortezano v. Salin Bank - (7th Cir. 5/21/12) Dist. Ct. didn't err in granting defendant-employer SJ in Title VII action alleging national-origin discrimination based on plaintiff's marriage to Mexican citizen whose presence in U.S. was unauthorized. Record showed plaintiff was terminated after defendant became concerned plaintiff's husband was illegal alien who used fraudulent documents to open accounts in defendant's bank. Title VII does not cover any discrimination based on status as illegal alien.

b. Guimaraes v. SuperValu, Inc., 674 F.3d 962 (8th Cir. 3/23/12) - No national origin discrimination found despite fact supervisor said she was "targeting" plaintiff and would attempt to stop her from getting her "green card." Citizenship discrimination is not illegal under Title VII - allegations of mocking her Brazilian accent provided some evidence but without additional support or evidence that supervisor actually referenced her accent derisively, evidence insufficient to avoid SJ.

7. Pregnancy

a. Hamilton v. Southland Christian School, 680 F.3d 1316 (11th Cir. 5/6/12) - Court reversed district court's SJ in pregnancy discrimination case involving employee of religious school. Plaintiff employed as teacher at Christian school. While employed, she conceived a child with her then-fiancé and shortly after becoming pregnant, married. Plaintiff went to school administrators to seek maternity leave and admitted during course of the meeting that child had been conceived prior to marriage. School terminated plaintiff for engaged in premarital sex, which school considered to be a sin. Plaintiff filed suit under Pregnancy Discrimination Act. District court granted SJ for school on basis plaintiff failed to present any direct or circumstantial evidence of discrimination. Eleventh Circuit reversed. While Title VII shouldn't be construed to protect right to engage in premarital sex, Title VII does protect right to get pregnant. Court questioned whether plaintiff's premarital sex or pregnancy was motivating factor for termination, as plaintiff presented evidence indicating employer was actually concerned with request for maternity leave more than premarital conception. Also, school administrator admitted during deposition plaintiff would not have been terminated if she had apologized. The Court held that the plaintiff's testimony that she had in fact apologized was evidence of pretext.

8. Class Action Certification in Discrimination Cases

a. In Re Enterprise Rent-A-Car, 683 F.3d 462 (3rd Cir., 6/28/12) - Court fashioned the "Enterprise Test" and considered all facts and circumstances in the record to conclude that the district court correctly determined plaintiffs failed to establish that Enterprise Holdings, Inc., the parent of 38 subsidiaries, was a joint employer of the branch assistant managers. Summary judgment in favor of Enterprise Holdings, Inc. affirmed.

b. Matamoros v. Starbucks Corp, 2012 WL 5458443 (1st Cir. 11/9/12) - Court affirmed an order granting class certification in a tip-pool case by ruling that the mere fact that a class action will not resolve every conceivable issue touching upon a challenged policy or practice does not require a court to throw out the class. Considerations of fairness and judicial economy are well-served by resolving the smaller group of claims in class action.

c. Puffer v. Allstate Ins. Co., 675 F.3d 709 (7th Cir. 2012). Denial of class certification of Title VII pay and promotion claims affirmed. Denial of certification of disparate impact issue waived because issue was not fully developed in district court, therefore not preserved as a basis for appeal. Alternatively, claim of disparate impact was insufficiently supported on the merits to warrant certification.

d. EEOC v. CRST Van Expedited, Inc., 670 F.3d 897 (8th Cir. 2012) - Court affirmed dismissal of Section 706 sexual harassment class action. EEOC had failed to investigate and conciliate the claims of each putative class member. Instead, EEOC used discovery as “fishing expedition” to try and locate affected individuals after suit had been filed. Result would have been different if EEOC alleged pattern or practice under Section 707 because no individual conciliation obligation would have existed.

B. ADEA

1. Cannata v. Catholic Diocese of Austin, TX, (5th Cir. 10/24/12) - church music director alleged he was terminated in violation of ADE) and ADA. Fifth Circuit affirmed district court dismissal of suit based on the ministerial exception, which bars employment-discrimination suits by ministers against their churches. Appeal presented first opportunity for Fifth Circuit to address ministerial exception in light of Supreme Court decision in Hosanna-Tabor.

2. Northwest Airlines v Phillips, 2012 WL 1150120 (8th Cir. 4/9/12) - Upheld district court’s holding that employer- sponsored planned contribution scheme did not violate ERISA or the ADEA. Company would make no contribution if employee was 55 or older; contribute 0-17% of pay if employee 50-54; up to 25% of pay if employee 40-49; and 9-21% of pay if employee 30-39. Participants counterclaimed alleging scheme violated ERISA, ADEA and state laws prohibiting age discrimination. The money purchase plan contribution scheme was developed post-bankruptcy by Northwest Airlines and Air Line Pilots Association (ALPA) using a “stovepipe” model which projected a hypothetical career for each pilot in order to determine final average earnings at retirement.

3. Shelley v. Geren, 666 F.3d 599 (9th Cir. 1/12/12) –
Plaintiff, employee of U.S. Army Corps of Engineers, alleged age discrimination under ADEA against employer, alleging he had been passed up for two job promotions. Claim was because of age discrimination, he wasn’t considered for 120-day temporary position, which later became a permanent position, and the successful applicant for both temporary and permanent positions was 11 years younger than he and didn’t possess same amount of relevant work experience or educational background. District court granted employer’s SJ, finding plaintiff failed to show “but-for” his age he would have been selected for both positions. Ninth Circuit reversed, finding plaintiff established prima facie case of age discrimination by showing he was well qualified for the positions, was 54 years old at the time, and that the positions went to someone much younger. Court held selection panel was aware of his age during the application process and that a reasonable juror could conclude he was significantly better qualified for positions than chosen applicant.

C. ADA

1. McDonough v. Donahoe, 2012 WL 833157 (1st Cir. 3/14/12) - Letter carrier claiming disability discrimination failed to show that her neck and back problems substantially limited her in any of the five major life activities she alleged or that she was regarded as disabled.

2. EEOC v. Thrivent Financial for Lutherans, No. 11-2848 (7th Cir. 11/20/12) - While ADA protects medical information about employees disclosed to employer as result of "medical examinations and

inquiries," such protection not infinitely elastic. Seventh Circuit, affirming SJ, held employer must already know something is wrong with employee before initiating interaction which constitutes a §12112(d)(4)(B) inquiry.

3. EEOC v. United Airlines, Inc., 2012 WL 718503 (7th Cir. 3/7/12) - reversing circuit precedent, the 7th Circuit ruled that the ADA requires employers to reassign employees unable to perform their current jobs because of disability to vacant positions for which they are qualified, absent a particularized showing of undue hardship to the employer.

4.. Steffen v. Donahue, 2012 U.S. App. LEXIS 5849 (7th Cir. 3/21/12) SJ to defendant-employer properly granted in claims under Rehabilitation Act and ADA alleging defendant terminated him on account of his disability after he attempted to return to his job under doctor's restrictions and after defendant insisted that plaintiff either return with no restrictions or apply for disability retirement. Plaintiff failed to identify major life activity to which he was substantially limited, and otherwise stipulated claim concerned only allegations that defendant improperly regarded him as disabled. Plaintiff also failed to show defendant regarded him as having substantial limitation in any major life activity. Fact that representative of defendant acknowledged belief that plaintiff was receiving accommodation for his disability didn't require different result, as record unclear as to representative's perception of "disability."

5. Samper v Providence St. Vincent Medical Center, 675 F.3d 1233 (9th Cir. 4/11/12) - court recognized ADA requires employers to make "reasonable accommodations" to employees suffering from disabilities, which may include change to employee's work schedule. However ADA does not require employer to ignore its attendance policy if attendance is considered an essential function of the employment at issue. Here, as plaintiff was a nurse in the neo-natal care unit of the hospital and the court held it would be unreasonable to permit plaintiff to call off work whenever she needed to as it could "compromise performance quality" in a way that "quite literally could be fatal."

6. EEOC v. Burlington Northern Santa Fe R.R., 669 F.3d 1154 (10th Cir., 2/28/12) - EEOC not entitled to subpoena railroad company's nationwide employee data system in course of ADA investigation of two rejected conductor applicants. Nationwide recordkeeping data not relevant to charges of individual disability discrimination filed by two men who applied for the same type of job in the same state. While Supreme Court has acknowledged the relevance requirement for EEOC subpoenas as not particularly constraining, it has also recognized that courts should not render the relevance requirement a nullity.

7. Wolski v. City of Erie, Case No. 1:08-cv-289-SJM (W.D. Pa. Sept. 28, 2012) The ADA prohibits an employer from terminating an employee because of an attempted suicide. Although the employer's concerns about safety may be well intended, they are not a basis for an adverse employment decision. One of the purposes of the ADA is to ensure that employers do not substitute their own judgment about "what is best" for an employee and, instead, let the employee and the medical professionals make those determinations.

D. FMLA

1. Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (3/20/12) - Court held that suits against states under FMLA are barred by the state's immunity as sovereigns in the federal system.

2. Pagel v. TIN, Inc., 2012 U.S. App. LEXIS 16548 (7th Cir. 8/9/12) - District court erred in granting defendant-employer's SJ in action alleging defendant terminated plaintiff in attempt to interfere with plaintiff's FMLA rights after plaintiff had reported to his supervisor that he had chest pains and needed to go to hospital. While defendant alleged plaintiff terminated for failing to meet expectations regarding sales volume and contacts, record contained dispute as to whether defendant failed to make reasonable adjustment to employment expectations to account for plaintiff's FMLA leave, then terminated him when he failed to meet unadjusted expectations. Record also showed supervisor relied on inaccurate data in finding plaintiff didn't meet reporting requirements.

3. Clinkscale v. St. Therese of New Hope, No. 12-1223 (8th Cir. 11/1312)- Reversing SJ in favor of employer, court held nurse sent home by employer's HR director after suffering panic attack can pursue interference claim under FMLA as sufficient factual issues existed as to whether employer had notice of nurse's FMLA-qualifying condition before determining she allegedly abandoned her position.

E. Immigration

1. Arizona v. U.S., 132 U.S. 2492 (6/25/12) - Court held that the federal government has the exclusive right to determine immigration policy which can affect trade, investment, tourism and diplomatic relations for the entire Nation.

F. Employment Agreements and Arbitration Clauses

1. Nitro-Lift Technologies, LLC v. Lee, 568 U.S. , (11/26/12) - Court held that the Oklahoma Supreme Court clearly erred in disregarding binding precedent. The FAA is the "supreme law of the land," giving it priority over any conflicting state statute or policy. The FAA provides that a court may review the enforceability of the arbitration clause itself, but if the clause is valid, the validity of the remainder of the agreement is for the arbitrator to decide.

G. At-Will Employment

1. Scott v. Merck, - (4th Cir. 11/27/12) Court reversed jury verdict of over $500,000 in favor of Scott, former Merck employee and concluded trial court erred in permitting Scott to argue that company's non-retaliation policy included enforceable promise not to terminate her employment. Court ruled Scott couldn't reasonably have believed non-retaliation policy included promise of continued employment, given express at-will disclaimers contained in employee handbook in which non-retaliation policy appeared.

2. In the Matter of Hyatt Hotels Corp., Case No. 28-CA0061114, The NLRB found that Hyatt's at-will acknowledgments in the employment handbook violate an employee's Section 7 rights under the National Labor Relations Act. As part of its settlement, the company agreed to rescind and revise existing acknowledgments. On October 31, 2012, the Acting General Counsel of the NLRB issued two memoranda on the topic of whether or not to pursue allegations that an employer violated the NLRA by maintaining statements in employee handbooks regarding the at-will nature of the employment relationship. Each policy was viewed under the standard that the policy or statement would be unlawful only if employees "would reasonably construe" the policy to restrict Section 7 protection of "concerted activities".

H. USERRA

1. Milhausen v. Minco Products (8th Cir. 12/5/12) After plaintiff's employment terminated as part of a reduction in force, he brought action under USERRA. Court affirmed jury's finding that plaintiff's position of employment would have been terminated had he not left for military service was entirely consistent with USERRA. USERRA requirement that returning service member be reemployed in position that he or she would have occupied had that employment not been interrupted by a military commitment doesn't preclude layoff or termination of returning service member.

I. Privacy

1. FAA v. Cooper, 132 S. Ct. 144 (3/28/12) - The Privacy Act of 1976 does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the Government's sovereign immunity from liability for such harms.

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United States - State Updates

Arkansas

Statutory Updates:
Arkansas Code Annotated § 11-10-502 (2012) (governing unemployment compensation benefits) was amended to implement changes in the insured worker's weekly benefit amounts.

Arkansas Code Annotated § 11-10-521 (2012) (governing notice to the last employer for unemployment compensation) was amended and now requires the Arkansas Department of Workforce Services set up a program to allow employers to receive and respond to employee claims via the agency's website.

Case Law Updates:
Civil Rights, Discrimination
Brodie v. Jonesboro, 2012 Ark. 5:

The plaintiff brought claims of racial discrimination against the city of Jonesboro under the Arkansas Civil Rights Act, alleging she was not promoted due to her race and alleging that she was constructively discharged. The employee/plaintiff was an accounting technician for the city. She was appointed to a supervisor position, but this position was later withdrawn, ostensibly because other employees complained that she was having a sexual relationship with her supervisor. The plaintiff then interviewed for the supervisor position along with other applicants, but was told that she was not going to be offered the position and that she would have to train the person selected. She thereafter resigned. The court held that the McDonnell Douglas burden shifting framework was applicable, but the circuit court had not properly evaluated the case under this framework. The circuit court made no mention of a *prima facie* case of discrimination, a legitimate, nondiscriminatory reason for the rejection, or pretext for discrimination. Additionally, the circuit court erred in treating the claim as one for constructive discharge. Summary judgment was reversed, and the case was remanded.

Tyrrell v. Oaklawn Jockey Club (W.D. Ark. Nov. 2, 2012):
An Arkansas Federal District Court recently ruled that repeated use of the n-word at work did not constitute a hostile work environment. The employee/plaintiff, who was a seasonal worker, admitted that the coworkers, who were also African American, directed the statements to themselves on all but one occasion. She complained to management who counseled the coworkers. When two coworkers used offensive language again, they were sent home for the day with a warning that subsequent bad language could result in their suspension. At the end of the live race season, the plaintiff was discharged: only five out of 428 food service workers were retaining in the off-season. Those five remaining workers were also reduced to part-time employees. The plaintiff subsequently sued under Title VII and the Arkansas Civil Rights Act alleging hostile work environment and retaliation. In making its ruling, the court gave great deference to the context and location of the speech.

Despite the racially charged language, by using the reasonable person standard, the court did not find Tyrrell suffered a hostile work environment. The court also evaluated several other factors to reach its decision including the fact that most of the racial references were not directed specifically at Tyrrell. The one instance the racial term was used in a non-derogatory manner toward Tyrrell, it was used to praise her and others for accomplishing a task and the court said "was at most coarse jesting." Other aspects of the case the court noted in support of its judgment for Oaklawn included Oaklawn's prompt and thorough investigation of the complaints and Oaklawn's disciplinary actions taken against employees who did not refrain from using such offensive language following specific instructions given on the issue.

Workers' Compensation Commission Cases and Updates
Frisby v. Milbank Mfg. Co., 688 F.3d 540, 542 (8th Cir. 2012):

The 8th Circuit Court of Appeals affirmed the Arkansas District Court's decision that a plaintiff's filing of an administrative Workers' Compensation Claim did not toll the three year statute of limitations for filing a wrongful death claim in tort against an employer. The Arkansas Workers' Compensation Act provides the exclusive remedy for work-related personal injury and wrongful death claims brought by employees. Here, the decedent employee suffered a heart attack and died while at work. The decedent's representative initially brought the claim before the Arkansas Workers Compensation Commission and subsequently attempted to file a civil action after the WCC claim was rejected. Although the Arkansas Supreme Court had not established precedent on the specific issue of whether filing a claim with the WCC tolled the limitations period to pursue a claim in tort, the 8th Circuit Court of Appeals analyzed its primary jurisdiction cases affirm the lower court's ruling that the civil action was not tolled by the filing of the administrative claim.

Tyson v. Narvaiz, 2012 Ark. 118 (2012):

The Supreme Court of Arkansas firmly established the standard to be used when evaluating employee disability compensation after an employee was terminated due to misconduct: The employee injured his shoulder on the job and was working on light duty when he called his female supervisor an insulting, derogatory, and vulgar name. The employer placed him on suspension and then terminated his employment due to insubordination and gross misconduct. The WCC held the employee was entitled to additional benefits, wage loss benefits, and attorney fees. The court of appeals overturned the decision. On review, the Arkansas Supreme Court held that the Commission's decision was supported by substantial evidence and a correct interpretation of Ark. Code Ann. § 11-9-526 (2002). The Commission correctly concluded that the employee's misconduct did not amount to a refusal of suitable employment.

California

While businesses across the country have been tuned in to federal lawmakers' efforts to avoid the dreaded "fiscal cliff" over the last few months, the California Legislature implemented many new changes for 2013 of which employers doing business in California should take particular note. Although the Legislature made some changes that expand protections for employees, there have also been changes which should provide employers more flexibility in complying with employment laws, such as a provision permitting electronic maintenance of personnel files rather than hard copies, and clarification that written commission agreements are not required for certain employee incentive payments. The changes discussed below will take effect January 1, 2013 unless otherwise stated.

- **Social Media**. Labor Code §980(a) will prohibit employers from requiring or requesting employees or job applicants to 1) provide user names or passwords for personal social media accounts; 2) access personal social media in the employer's presence; and 3) disclose whether they use personal social media at all. There will be exceptions, such as where the employer needs to conduct an internal investigation, or where employer-owned electronic devices are used to access personal social media.

- **Reasonable Accommodation for Religious Observance.** The Fair Employment & Housing Act (FEHA) will be amended to provide additional protections for religious dress and grooming practices, including, for example, religious head coverings and facial hair. Government Code §§ 12926 and 12940 will provide that employer efforts to segregate an individual from other employees or the public cannot be considered a "reasonable accommodation" for that individual's religious dress or grooming practices.

- **Breastfeeding and Sex Discrimination**. FEHA (Gov't Code §12946(q)(1)(c)) will be amended to expand the definition of "sex" discrimination to include breastfeeding and related medical conditions as protected characteristics.

- **Inspection of Personnel Records.** Labor Code §§ 226 and 1198.5 will be amended to permit

employers to keep a "copy" of employee personnel records by maintaining the required information electronically, rather than in hard copy. They will also impose limits on the number of inspection requests an employee may make in a given month and reduce the severity of the penalty for an employer's failure to comply with such a request. Although the severity of the penalty will be reduced from a misdemeanor to an "infraction," the scope of what constitutes an "infraction" will be expanded.

- **Penalties for Wage Statement Violations.** Labor Code §226 will be amended to more specifically define the "injury" suffered by an employee where the employer violates the itemized wage statement requirement. The new law will clearly state that an employer's failure to provide an accurate wage statement or a failure to provide a wage statement at all constitutes an "injury" entitling the employee to a monetary penalty, costs, and attorney's fees.

- **Commission Agreements**. Labor Code §2571, which requires that written commission agreements be in writing, will be amended to provide an exception for temporary, variable incentive payments that increase, but do not decrease, payment under the contract. Thus, agreements to make such payments need not be separately stated in writing.

- **Fixed Salaries and Overtime.** Labor Code §515 will be amended to state that payment of a fixed salary to a nonexempt employee will be deemed to be payment only for the employee's regular non-overtime hours notwithstanding any private agreement to the contrary.

- **Elimination of FEHC.** The Fair Employment and Housing Commission (FEHC) will be eliminated and its duties assumed by the Department of Fair Employment and Housing (DFEH). Instead of holding administrative hearings as the FEHC did, the DFEH will be empowered to bring civil actions on behalf of a complaining party directly in court and provide mandatory dispute resolution.

- **Human Trafficking Posting**. Civil Code §52.6 will require specified businesses to post an 8.5" x 11" notice containing information about organizations that provide services to eliminate human trafficking. Covered businesses include on-sale general public premises licensees under the Alcoholic Beverage Control Act, adult or sexually oriented businesses, airports, intercity rail stations, bus stations, truck stops and roadside rest areas, emergency rooms and urgent care centers, farm labor contractors, private job recruitment centers, and certain businesses offering massage or bodywork services for compensation. The Department of Justice will develop a compliant notice which will be available for download on its website. This law goes into effect on April 1, 2013.

- **Prevailing Wages**. Labor Code §§ 1773.1 and 1773.8 will be amended such that employer payment contributions that result in a lower hourly straight time or overtime wage will not constitute a violation of the applicable prevailing wage determination, so long as 1) the increased employer payment is made pursuant to criteria set forth in a collective bargaining agreement; 2) the basic hourly rate and increased employer payment are no less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the director's general prevailing wage determination; and 3) the employer payment contribution is irrevocable unless made in error. These amendments codify the position the Department of Industrial Relations already takes with respect to this issue. Many collective bargaining agreements allow members to elect to have a percentage or a set amount deducted from their paycheck and deposited in a union pension/health care account. The DIR has taken the position this does not constitute a violation of the prevailing wage as long as the total hourly package equals or exceeds the correct prevailing wage.

- **Farm Labor Contractors – Increased Penalties.** Labor Code §1683 will be amended to provide for additional, progressive monetary penalties against farm labor contractors who violate licensing requirements based on the number of farm workers employed during the period of noncompliance. An initial violation of the licensing requirement can result in a penalty of up to

$10,000, with successive maximum penalties of $20,000 and $50,000 for second and third violations.

- **Warehouse Workers**. The prior version of Labor Code §2810 prohibited a person or entity from entering into an agreement with contractors in the construction, farm labor, garment, janitorial, and security industries where the person or entity knew or should have known that the agreement did not include funds sufficient to comply with all applicable laws and regulations. As of January 1, 2013, Labor Code §2810 will additionally apply to persons or entities contracting with warehouse workers.

- **Itemized Wage Statements**. Effective July 1, 2013, Labor Code §§ 226 and 2810.5 will require temporary services employers ("temp agencies") to provide additional information in their wage statements, including rate of pay and total hours worked for each assignment, and the name, physical address, and mailing address of the physical location where the employee performs work.

- **Wage Garnishment**. Effective July 1, 2013, Code of Civil Procedure §§ 706.011 and 706.050 will be amended to increase the amount of wages exempt from garnishment. The amendment redefines "disposable earnings" which are subject to garnishment as those earnings which are calculated immediately after standard deductions are withheld by the employer.

- **Unemployment Insurance Overpayments.** Several provisions of the Unemployment Insurance Code will be amended to permit the Employment Development Department (EDD) to deny reimbursement to an employer for any overpayments by the employer made to an unemployment insurance reserve account if the EDD determines that the overpayment resulted from an employer's failure to respond to or provide adequate information to the EDD. This law applies to overpayments established on or after October 22, 2013.

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Connecticut

There were no employment law statutes enacted by the Connecticut legislature in 2012, but there were three cases of note decided by the Supreme Court. Two involved, among other things, the interpretation of Connecticut General Statutes § 31-51q, which protects the free speech rights of employees, in light of the U.S. Supreme Court's decision in Garcetti v. Ceballos, 547 U.S. 410 (2006). The third held that Connecticut's statute protecting persons from discrimination based on sexual orientation, General Statutes § 46a-81c(1), creates a private cause of action for hostile work environment claims.

The first of these cases to be decided was Perez-Dickson v. City of Bridgeport, 304 Conn. 483 (2012). Perez-Dickson involved several claims brought by a school principal based on the allegation that she was transferred and demoted after she reported two instances in which students were abused by two separate teachers. In addition to claiming that the adverse employment actions were racially-motivated, she also claimed that the transfer violated Connecticut General Statutes § 31-51q and 17a-101e, respectively, insofar as the transfer was related to her exercise of free speech protected by the First Amendment to the U.S. Constitution and to her protected report of child abuse.

Section 31-51q creates a private cause of action for employees who are subject to “discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4, or 14 of article first of the Constitution of the state.” However, the U.S. Supreme Court in Garcetti held that speech made by a public employee in the course of employment is not protected by the First Amendment. It was undisputed that Perez-Dickson’s reports of abuse were made in the course of her employment, so the Perez-Dickson Court held that Garcetti barred her claims made under § 31-51q. Perez-Dickson, 304 Conn. at 497-98. Although Perez-Dickson had also argued that sections 3, 4, and 14 of the state constitution provided greater protection of her free speech rights than did the First Amendment of the U.S. Constitution, the Court held that she had failed to preserve those claims for review and declined to address what would have been an issue of first impression. Id. at 498, 503.

In addition to the foregoing, the Perez-Dickson Court also stated in a footnote that the alleged violation of Connecticut’s whistleblower protection statute, § 31-51m, could not form the basis for a claim under § 31-51q if the plaintiff was not “exercising constitutional speech rights.” Perez-Dickson, 304 Conn. at 498 n.20. Finally, the Court addressed the plaintiff’s claims under Connecticut General Statutes § 17a-101e. That statute permits the Attorney General to bring suit against employers who discipline, discharge, or otherwise retaliate against employees who report or testify concerning child abuse. The Court held that that statute did not create a private cause of action. Id. at 505-08.

On the same day as the Court decided Perez-Dickson, it also released another opinion concerning § 31-51q in Schumann v. Dianon Systems, 304 Conn. 585 (2012). Schumann involved claims that the defendant, a medical testing laboratory, wrongfully terminated plaintiff’s employment after he voiced concerns about whether a new urine analysis test the lab was to perform was based on adequate levels of clinical research. Plaintiff claimed that the concerns he raised constituted speech protected by the First Amendment. The issue on appeal was whether the Garcetti rule regarding statements made in the course of employment also applied to private employers. Analyzing the text of the Garcetti opinion and decisions from other jurisdiction addressing this issue, the Schumann Court held that Garcetti creates a threshold level of analysis for claims under § 31-51q wherein the court must determine whether an employee is speaking pursuant to official duties before analyzing other issues regarding free speech rights. Id. at 601-04. The Court further held that the Garcetti rule and analysis applies not only to public employers, but also to private employers. Id. at 611. Thus, because plaintiff’s speech was made in furtherance of his official duties, he was precluded from making his § 31-51q claims even though the defendant was a private employer. Id. at 616-18.

Finally, the Court held in Patino v. Birken Manufacturing, 304 Conn. 679, 687 (2012) that the plaintiff brought a valid hostile work environment claim pursuant to Connecticut General Statutes § 46a-81c(1), which prohibits, among other things, discrimination “in terms, conditions or privileges of employment because of the individual’s sexual orientation or civil union status.” The Court held that “because the phrase ‘terms, conditions or privileges of employment’ is a well settled term of art in antidiscrimation law, hostile work environment claims fall within the purview of § 46a-81c(1).” Id.

Florida

Florida’s minimum wage increased as of January 1, 2013 to $7.79 per hour. This was a 0.12 cent increase from 2012 and is higher than the federally imposed minimum wage rate of $7.25. Employers

who have "tipped employees" may be eligible for the tip credit under the Fair Labor Standards Act but must nonetheless pay a wage to such employees of $4.77 per hour plus tips.

In 2012, Florida's Unemployment Compensation Laws were renamed as the Reemployment Assistance Program Law. With the new name came a series of substantial changes. For example, the Department of Economic Opportunity was given the authority to noncharge the accounts of employers that had to lay off employees due to a man-made disaster of national significance. The new law also allowed for the reduction of the number of required work search contacts/events from five to three for workers in small counties. Additionally, the new law provided clarification as to the work search requirements for union members, those on temporary layoffs, or those participating in short time compensation plans. The new law also increased the period of disqualification for fraudulent claims – the "disqualification imposed … shall begin with the week in which the false or fraudulent representation is made and shall continue for a period not to exceed 1 year after the date the Department of Economic Opportunity discovers the false or fraudulent representation and until any overpayment of benefits resulting from such representation has been repaid in full." Fla. Stat. § 443.101(6).

Last year also saw a number of differing opinions relating to whether the Florida Civil Rights Act, Fla. Stat. § 760.10 ("FCRA"), specifically, the protected classification of gender, included protection against discrimination based on pregnancy. Should be noted that while Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e-2 ("Title VII") was amended to prevent discrimination on the basis of pregnancy in 1978, the FCRA, largely modeled to mimic Title VII, was never similarly amended. The FCRA is generally construed in line with how courts construe Title VII, but since the FCRA was never amended after Title VII was to prevent discrimination on the basis of pregnancy, it was unclear whether the FCRA also protected pregnant women from discrimination. The issue is significant for employers because, if an employee can bring a pregnancy discrimination claim under FCRA, the limitations on damages awards applicable to Title VII claims would not apply, thus the scope of liability for employers would be greater.

In 2012, the Third District Court of Appeal in *Delva v. Continental Group, Inc.*, 96 So. 2d 956 (Fla. 3d DCA 2012), held that the Florida Civil Rights Act ("FCRA") did not prohibit discrimination in employment on the basis of pregnancy. This decision relied upon the reasoning in the prior similar holding of the First District Court of Appeal in *O'Laughlin v. Pinchback*, 579 So. 2d 788, 790 (Fla. 1st DCA 1991). However, the Fourth District Court of Appeal in *Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008), *review denied*, 20 So. 3d 848 (Fla. 2009), held that the FCRA did in fact protect against pregnancy discrimination. The court in *Delva* certified the conflict with *Carsillo* and therefore further developments in this area of the law are expected. Interestingly, the U.S. District Court, Middle District of Florida in *Wynn v. Florida Automotive Services, LLC*, Case No. No. 3:12–cv–133–J–32MCR, 2012 WL 4815688 * 2 (M.D. Fla. Oct. 10, 2012) (providing persuasive but not controlling precedent in interpreting Florida statutes) held more recently that the FCRA did prohibit pregnancy discrimination.

In relation to the Florida Whistleblower Act, the First District Court of Appeals affirmed a Florida Commission of Human Right's decision to dismiss a public whistleblower's complaint filed within 60 days after the date of plaintiff's termination. The decision was based on the FCHR's determination that the statute of limitations for filing a whistleblower retaliation claim pursuant to the Public Whistleblower Act began running when plaintiff first learned of the impending hearing on her termination, not her actual termination. *Bryant v. Florida School for the Deaf and the Blind*, 85 So. 3d 488 (Fla. 1st DCA 2012).

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Georgia

Immigration: On August 20, 2012, the Eleventh Circuit Court of Appeals upheld an injunction of the potential employment aspects of Georgia's "Illegal Immigration Reform and Enforcement Act of 2011." Georgia Latino Alliance for Civil Rights et. al. v. Governor of Georgia, 691 F.3d 1250 (2012). Section 7 of the Illegal Immigration Act criminalizes:

- Transporting or moving an illegal immigrant.
- Concealing or harboring an illegal immigrant.
- Inducing an illegal immigrant to enter Georgia.

Section 8 of the Illegal Immigration Act authorizes Georgia law enforcement officers to investigate the immigration status of an individual if:

- The officer has probable cause to believe that the individual committed another crime.
- The individual cannot provide one of the pieces of identification listed in the statute, such as a Georgia driver's license or Georgia identification card.

The issue before the Eleventh Circuit was whether to uphold the trial court's injunction of the entire law. The Eleventh Circuit held

- The plaintiffs have shown a likelihood of success on their claim that Section 7 is preempted by federal law. The Eleventh Circuit affirmed the district court's preliminary injunction of that Section.
- The plaintiffs cannot establish that they are likely to succeed on their preemption argument regarding Section 8, because the Georgia law has the same "built-in limitations" as the law upheld by the Supreme Court in Arizona v. United States, and in some ways is less facially problematic than that law. Therefore, the Eleventh Circuit reversed the district court's preliminary injunction of Section 8.

Despite the court's overruling of those portions of the law that might potentially apply to employing illegal aliens, employers should of course maintain vigilance in complying with the Immigration Reform and Control Act of 1986 (IRCA) and all other laws regarding the hiring and employment of non-U.S. citizens.

Garnishments: The Georgia Legislature acted in 2012 to overrule a 2011 Georgia Supreme Court decision that required employers to retain counsel for responding to garnishments filed in Georgia state and superior courts. To the dismay of many employers and business owners, the Court's ruling effectively prohibited non-lawyers, such as human resources professionals and payroll employees, from responding to routine garnishments filed in Georgia Courts. On February 7, 2012, Governor Nathan Deal effectively undid the Georgia Supreme Court's ruling by signing into law HB 683, which permits an "authorized officer or employee" of a business to sign and file a garnishment answer. Another important change in the law is that the amount of money an employer responding to a garnishment can deduct for its expenses associated with filing an answer has increased. Under the old law, a garnishee was entitled to deduct either $25.00, or 10 percent of the amount paid into court up to a maximum amount of $50.00 - whichever was greater. Under the new law, a garnishee may deduct either $50.00, or 10 percent of the amount paid into court up to a maximum amount of $100.00 - whichever is greater. Although it is no longer mandatory for employers to use a licensed attorney to handle routine garnishments, employers will still need to retain counsel for responding to default judgment and traverses.

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Illinois

Illinois Labor Relation Board Ruling Reversed for Failure of Admissible Proof Under Federal Rule of Evidence 408 and Illinois Administrative Code

In County of Cook v. Illinois Labor Relations Board, the Appellate Court of Illinois reversed a ruling by the ILRB which reinstated two employees of the Cook County Temporary Detention Center due to alleged antiunion animus. The Court held that the ILRB abused its discretion in admitting evidence consisting of a response made during a settlement conference by a Cook County employee. The employee, a human resource representative, purportedly stated during the conference that one of the terminated employees would not be offered reinstatement because she had filed "14 or 15 union grievances." The admission of this evidence violated Federal Rule of Evidence 408[1] and the ILRB rule on settlement talks:

> The Board, as a matter of policy, encourages the voluntary efforts of the parties to settle or adjust disputes involving issues of representation, unfair labor practices, and interest and rights disputes. Any such efforts at resolution or conciliation and any resulting settlements shall be in compliance with the provisions, purposes and policies of the Act. Any facts, admissions against interest, offers of settlement or proposals of adjustment that have been submitted pursuant to this Section shall not be used as evidence of an admission of a violation of the Act." 80 Ill. Adm.Code 1200.120 (2010).

In addition to the inadmissibility of the evidence, the Appellate Court noted that such evidence, alone, was insufficient to bear the parties' burden. The ILRB's decision was therefore was against the manifest weight of the evidence.

Further, the Court asserted that the human resources employee who allegedly made the statement at issue did not have decision-making authority. Because the human resource employee's comment did not shed light on the issue of whether the sole decision-making supervisor acted out of ill will, it was not probative. Therefore, even if the statement were admissible, it was insufficient to prove that Cook County acted with antiunion animus.

Amendment to Human Rights Act Does Not Waive State's Sovereign Immunity

The Appellate Court of Illinois addressed a 2010 amendment to the Human Rights Act and its effect on sovereign immunity in Watkins v. Office of State Appellate Defender. The statute, in pertinent part, reads:

> The notice of dismissal issued by the Director shall give the complainant notice of his or her right to seek review of the dismissal before the Human Rights Commission or commence a civil action in the appropriate circuit court. 775 ILCS 5/7A–102(C)(4), (K) (West 2010).

Plaintiffs claimed that the amended statute indicated that the State intended to waive its immunity with respect to claims brought under the Human Rights Act. The Appellate Court, however, rejected this argument: "[a] waiver of the [S]tate's sovereign immunity must be clear and unequivocal." *See* Martin v. Giordano, 115 Ill.App.3d 367, 369, 71 Ill. Dec. 245, 450 N.E.2d 933, 934 (1983). "It must be expressed through specific legislative authorization and must appear in affirmative statutory language." (quoting In re Special Education of Walker, 131 Ill.2d at 304, 137 Ill.Dec. 575, 546 N.E.2d at 522)).

The Appellate Court also upheld the circuit court's holding that an individual cannot be held personally liable under the Human Rights Act. Although the Act prohibits a "person" from retaliating against another for filing a charge, the "person" referred to by the statute is an employer of less than 15 employees. The Court cited Anderson v. Modern Metal Products, 305 Ill.App.3d 91, 101–02, 238 Ill.Dec. 361, 711 N.E.2d 464, 471 (1999) in its assertion that claims against an individual company employees are not allowable

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[1] Subsequent to the ILRB hearings, the Illinois Supreme Court enacted a state version of the Rule 408. Ill. R. Evid. 204 (effective Jan. 1, 2011).

where the retaliation was not “personally motivated” or “done without the knowledge or consent of the employer.”

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Indiana

Statutory Updates

1. Smoking Ban in Places of Employment

Indiana’s statewide smoking ban, codified at Indiana Code § 7.1-5-12 et seq. (“the Act”), took effect July 1, 2012. The prohibition on smoking applies to: (1) public places; (2) places of employment; (3) vehicles owned, leased, or operated by the state if the vehicle is being used for a governmental function; and (4) areas within eight feet of a public entrance to a public place or a place of employment. “Smoking” means the carrying or holding of a lighted cigarette, cigar, pipe, or any other lighted tobacco smoking equipment or the inhalation or exhalation of smoke from lighted tobacco smoking equipment. A “place of employment” is defined as an enclosed area of a structure that is a place of employment but does not include a private vehicle.

While the Act contains explicit limited exemptions, most Indiana employers must comply. First and foremost, employers must ensure that any designated smoking areas are outside the eight-foot radius around the facility’s entrance. Additional requirements of employers under the Act include removing ashtrays or other smoking paraphernalia and posting signs containing language outlined in the Act. State-approved signs are available on the Indiana Alcohol and Tobacco Commission’s website. Employers must also inform each current and prospective employee of the smoking prohibition applicable to the place of employment. However, the Act does not require a specific form of written notice, so it is up to employers to make this determination. As is often the case, when a “place of employment” is also a “public place,” additional requirements exist. Additionally, the Act prevents employers from discharging, refusing to hire, or in any manner retaliating against an individual for reporting a violation of the Act or exercising any right or satisfying any obligation under the Act.

The typical penalty for a smoking violation is a Class B infraction. However, having three or more prior, unrelated violations of the Act will constitute a Class A infraction. Penalties for noncompliance by employers mirror these penalties. Stricter ordinances adopted by a local government are neither prohibited nor superseded by the Act.

2. Right-to-Work Act

On February 1, 2012, Indiana’s Right-to-Work law became effective, making Indiana the nation’s 23rd state overall to pass such legislation. Notably, Indiana is the first state in the traditionally highly-unionized “Manufacturing Belt” or “Rust Belt.” The Right-to-Work legislation can be found at Ind. Code § 22-6-6 et seq. While labor organizations like unions are, of course, still allowed in Indiana, this legislation makes participation the employee’s choice. The law provides that no employer, labor organization, or other person, as defined in the Act, may require an individual to become or remain a member of a labor organization, or pay dues, fees, assessments, or charitable donation substitutes as a condition of employment, new or continued. Such decisions can no longer impact whether an employee is hired or can keep a job in the state.

The Right-to-Work legislation defines "employer" as a person employing at least one individual in Indiana or an agent thereof. As such, non-Indiana employers with even just one employee working in Indiana are subject to the Act. It does not, however, apply to government employees at the federal, state, or local levels or to employees covered by the Railways Labor Act.

The legislation criminalizes violations of the Right-to-Work Act. A person that knowingly or intentionally, directly or indirectly, violates this law commits a Class A misdemeanor. The statute also includes a private right of action that can be brought in civil court, in addition to providing for an administrative remedy with the Indiana Department of Labor. In a successful civil action, the court may award the greater of either: (1) actual and consequential damages resulting from the violation or threatened violation; or (2) liquidated damages of not more than one thousand dollars. Additionally, attorney's fees, litigation expenses, and costs are available, and the statute authorizes declaratory or equitable relief, including injunctive relief, as well as any other relief the court deems proper.

3. Criminal History Information of Employees and Applicants

Effective July 1, 2012, Indiana employers are prohibited from asking whether the criminal records of an employee, either current or prospective, have been sealed or restricted. The law does not explicitly define "employer." However, an employer's violation of this law constitutes a Class B infraction. Unlike Right-to-Work, the legislation does not explicitly provide for a private right of action against an employer who asks an individual about his or her sealed or restricted criminal records or who takes adverse employment actions against someone who exercises his or her right under this law to withhold information about sealed or restricted criminal information in response to employer inquiries.

Additionally, if the court has sealed or restricted the criminal record of a person defined under the statute, codified at Ind. Code § 35-38-8 et seq., that individual may legally state on an application for employment that he or she has not been arrested or convicted of the felony or misdemeanor recorded in the restricted records.

Beginning July 1, 2012, new restrictions were also placed on criminal history information that can be obtained from the State of Indiana, namely clerks of court. This affects the scope of information that employers can expect in background reports. Ind. Code §§ 34-28-5, -6 provide that if a person alleged to have violated a statute defining an infraction (1) is not prosecuted or if the action against the person is dismissed; (2) is adjudged not to have committed the infraction; (3) is adjudged to have committed the infraction and the adjudication is subsequently vacated; or (4) was convicted of the infraction and satisfied a judgment imposed for the violation more than five years ago, the court in which the action was filed shall order the clerk not to disclose or permit disclosure of information related to the infraction to a noncriminal justice organization or an individual. With the "noncriminal justice organization or an individual" language, this change in the law will affect employers and entities like consumer reporting agencies.

CASE LAW UPDATES

1. Blacklisting Statute

In March, the Indiana Supreme Court issued its opinion in Loparex v. MPI Release Tech., providing clarification with regard to the state statute prohibiting blacklisting. 964 N.E.2d 806 (Ind. 2012). In short, two former employees of Loparex began subsequent work with MPI, one after termination and one after resignation. Id. at 810. Loparex sought injunctive relief under the Illinois Trade Secrets Act and damages for the alleged breach of non-compete agreements. Id. The employees counterclaimed, accusing the former employer of blacklisting. Id. The Indiana blacklisting statute creates liability for former employers who attempt, by words or action, to prevent a former employee from gaining new employment. See Ind. Code § 22-5-3-2. Giving modern analysis to the statute's interpretation, our Supreme Court overruled a century-old decision that confined the statute's protection to discharged employees and extended the statute's reach to those who voluntarily quit as well. Loparex, 964 N.E.2d at 812-15. Thus, individuals who voluntarily leave employment are not barred from making a claim against their former employer for blacklisting. Id.

With regard to damages for a blacklisting violation, the statute states in relevant part, "… said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages." I.C. § 22-5-3-2. In Loparex, the former employees sought attorney's fees from their former employer as an aspect of compensatory damages. Loparex, 964 N.E.2d at 816. Applying the American Rule's proscription against the award of attorney's fees in the absence of statutory authorization, the Court found no ambiguity in this statute that could authorize the award of attorney's fees as compensatory damages. Id. at 816-17. Finding nothing in the language, history, or nature of Indiana's blacklisting statute that points to anything other than the application of the American Rule, the Court held that attorney's fees may not be recovered as an element of compensatory damages for a plaintiff in a blacklisting claim. Id. at 818.

Finally, the Court analyzed whether a lawsuit by an employer to protect trade secrets falls within the conduct envisioned to be prohibited by the blacklisting statute. After much debate regarding the definition and scope of "blacklisting," the Court offered a definition of "blacklisting" under the statute. Id. at 820-21. Until this point, neither the statute nor case law had defined what it meant to "blacklist" an employee. Id. at 819. The Court held that employers cannot face liability under the statute merely for attempting to enforce a non-compete agreement or protect trade secrets in court. Id. at 824. Whether or not successful, such action by an employer against a former employee is not a basis for recovery under the Indiana blacklisting statute. Id.

2. "Just Cause" for Denial of Unemployment Benefits

In Conklin v. Review Bd., the Court of Appeals clarified that a showing of fault is a necessary aspect of a finding that an employee breached a duty to his employer as "just cause" for discharge that would result in the denial of unemployment benefits. 966 N.E.2d 761 (Ind. Ct. App. 2012), reh'g denied. A truck driver lost consciousness while driving, causing damage to the truck and its load. Id. at 763. The employer's internal review board recommended termination, finding that the employee was unsafe to continue driving for them. Id. An administrative law judge reversed the employee's initial reward of unemployment benefits, finding that the employee breached a duty reasonably owed to his employer and was therefore terminated for just cause. Id. The employee appealed.

Ind. Code § 22-4-15-1(d) lists nine non-exhaustive factors constituting "discharge for just cause" that will result in denial of unemployment benefits to a discharged employee. Id. This appeal turned on the last, the Board's sole basis for denial of benefits, which reads, "any breach of duty in connection with work which is reasonably owed an employer by an employee." Id. at 763-64; I.C. § 22-4-15-1(d)(9). Our courts had previously examined the evidence necessary for an employer to establish a prima facie case that an employee was terminated for "just cause" for a breach of duty. While language in a prior Supreme Court decision suggested that such "just cause" discharge for a breach of duty does not statutorily require any consideration of the willfulness of the employee's conduct, that Court still addressed whether the employee's conduct was volitional and whether some control was exercised over the circumstances leading to the discharge. Conklin, 966 N.E.2d at 764-65; See Recker v. Review Bd., 958 N.E.2d 1136 (Ind. 2011); See also Giovanoni v. Review Bd., 927 N.E.2d 906 (Ind. 2010).

Based on such prior analysis by our Courts, the Court of Appeals held that evidence of fault – a volitional act or circumstances over which the employee exercised some control – is necessary to find a breach of duty discharge. Conklin, 966 N.E.2d at 765. The Court was unable to equate an unexplained, involuntary loss of consciousness to a finding of fault and thus found that the employer did not sustain its burden of proving that the employee was terminated for "just cause" for a breach of duty. Id. Without a finding of fault, the employee did not breach a duty to his employer in the statutory sense and was therefore eligible for unemployment benefits. Id. at 766.

3. Title IX

Title IX not only requires schools to establish athletic programs for female athletes but also prohibits schools from discriminating against participating females by denying equivalence in benefits, such as equipment, facilities, coaching, scheduling, and publicity. Parker v. Franklin Cnty. Cmty. Sch., 667 F.3d 910, 916 (7th Cir. 2012). In Parker, plaintiffs brought a disparate treatment claim seeking substantial

equality in program components of athletics and challenging the defendants' facially discriminatory policy of scheduling more boys' basketball games on primetime nights than girls' because of sex. Id. Specifically, plaintiffs sued fourteen Indiana school defendants alleging discrimination in scheduling only half of the girls' varsity basketball games on primetime nights whereas 95% of the boys' varsity basketball games were occurring on primetime nights. Id. at 914. The girls' games are played on primetime nights until the boys' season began two weeks later, at which point the girls were relegated to playing most of their games on week nights. Id. With week night games, the girls' team lost the large weekend audience, pep band, cheerleaders, and dance team and also struggled to complete schoolwork, which had an effect on grades. Id. at 913-14.

In its analysis of the sport-specific disparity, the 7th Circuit vacated the grant of summary judgment in favor of the defendants. Id. at 929. Plaintiffs presented evidence of the negative impact this disparity had on the girls, including feelings of inferiority and the potential effect of discouraging girls from participating in sports, and the Court found that Franklin had not gone far enough to remedy the harmful effects of such disparity. Id. at 923-24. The Court held that a factual issue existed as to whether obvious disparity in scheduling girls' and boy's high school basketball games in primetime, and the resulting harm, were substantial enough to deny equal athletic opportunity, which includes equivalent opportunity to compete before audiences. Id.

In addition, plaintiffs asserted a § 1983 equal protection claim. Id. at 925. Disagreeing with the defendants, who argued that they are deemed "arms of state" for purposes of the Eleventh Amendment, the Court held that school corporations, as local governmental units, are "persons" for § 1983 purposes and are therefore subject to suit under this statute. Id. at 926-27. As the district court had previously entered summary judgment for defendants based on sovereign immunity, the Court remanded for the district court to determine whether any genuine issue of material fact exists as to plaintiff's equal protection claims. Id. at 929.

4. Qualified Privilege

A former housing inspector of the Indianapolis Housing Agency was terminated after an investigation and determination that he was conducting personal business during work hours, for which he had been previously disciplined. Brown v. Indianapolis Hous. Agency, 971 N.E.2d 181, 183 (Ind. Ct. App. 2012). Subsequent prosecutorial charges were filed against the former employee for ghost employment, official misconduct, and deception. Id. at 184. The charges were eventually dismissed by the prosecutor voluntarily. Id. at 184-85. Thereafter, the former employee sued his former employer for malicious prosecution and intentional infliction of emotional distress based on the employer's statements to law enforcement. Id. at 185. The trial court granted summary judgment for the employer. Id.

Affirming, the Indiana Court of Appeals held that the employer had a qualified privilege to report the employee's suspected criminal conduct, which bars both of the former employee's claims. Id. at 183. While such privilege had been previously applied to claims of intentional infliction of emotional distress, the Court specifically concluded that the privilege also applies to a malicious prosecution claim arising out of the reporting of suspected criminal conduct. Id. at 186. The Court analogized it to a defamation claim, both of which contain a malice element. Id.

Further, the Court determined that the designated evidence did not raise a genuine issue of material fact regarding whether the privilege was abused. Id. The former employee did not contend that there was excessive publication of his allegedly criminal conduct. Id. Additionally, the employee's belief that his employer harbored ill will toward him was based on pure speculation. Id. Regarding whether the report of alleged criminal conduct was made without belief or grounds for belief in its truth, the Court found no evidence to confirm the employee's contentions. Id. at 187. Further, the employee did not contest any of the evidence contained in the probable cause affidavit outlining the employer's steps in investigating his conduct. Id. at 188. Instead, the employee merely offered an alternative explanation for his conduct, and the Court determined that the fact that the employer reached a different conclusion about his conduct is insufficient to show that it abused the privilege for reporting suspected criminal conduct. Id. Finally, for the same reasons cited in its analysis regarding the alleged abuse of privilege, the Court found, as a matter of law, that the employee was unable to establish both the extreme and outrageous conduct

element of his intentional infliction of emotional distress claim and the malice element of his malicious prosecution claim. Id.

5. Breach of Employment Contract Claim against Former Employer

Granting transfer, the Indiana Supreme Court affirmed the trial court's summary judgment for defendant-university after a former tenured professor filed an action against the university alleging that its decision to terminate him for violation of its sexual harassment policy constituted a breach of his employment contract. Haegert v. Univ. of Evansville, 977 N.E.2d 924 (Ind. 2012). In short, the professor's appointment was governed by a yearly tenure contract with the University of Evansville which incorporated by reference, among other things, the university's faculty manual. Id. at 929. The faculty manual contained provisions expressing the university's policy and disciplinary procedures with respect to harassment and sexual harassment and included definitions of both harassment and sexual harassment. Id. In relevant part, the professor's tenure contract provided that a failure to "perform the duties in accordance with the standards of performance established by the University and to abide by and to fulfill all duties, responsibilities, and obligations imposed by the Board's governing rules or by the University" would be considered cause to terminate the appointment. Id.

A particular encounter between the professor and his female department head triggered the filing of a formal harassment complaint by the department head through the university's disciplinary review process. Id. at 933. However, this encounter was not the first instance in which the professor's conduct toward women had been complained of, investigated, or addressed over a period of several years. Id. at 931. Notes regarding these complaints as well as personal, uncomfortable experiences with the professor were kept throughout the years by this department head. Id. After an investigation, the Review Committee's determinations regarding this formal complaint found the professor in violation of the university's sexual harassment policy. Id. at 934. Subsequent disciplinary proceedings and appeals processes in accordance with the procedures laid out in his employment contract, including an appeals committee in which a formal hearing took place, came to the same conclusion and found adequate cause for dismissal. Id at 930-31, 934-35. The professor eventually submitted an appeal with the university's Board of Trustees, which was also denied. Id. at 935-36.

Then, the professor filed a complaint against the university alleging multiple breaches of his employment contract. Id. at 936. The trial court granted the university summary judgment, but the Court of Appeals reversed, concluding that the university failed to satisfy its burden of proof with respect to the sexual harassment complaint. Id. On transfer, the Supreme Court distilled the professor's many allegations into two primary issues: (1) was his conduct during the particular encounter with his department head actionable as harassment or sexual harassment under the terms of his employment contract, and therefore subject to sanction by dismissal and rescission of his contract; and (2) if so, did the university follow the proper procedures for doing so, as set forth in the employment contract. Id. at 938.

The Supreme Court held that the professor's conduct toward his department head satisfied both the university's broad definition of "harassment" and its more particularized definition of "sexual harassment" as set forth in his employment contract. Id. at 943. There was no genuine issue of material fact that under the express terms of his contract, the spectrum of sanctions available to the university subsequent to even a single finding of harassment includes termination and dismissal. Id.

The Court also evaluated whether the university breached the professor's employment contract by denying him procedural entitlements afforded under the contract's terms. Id. at 943-44. The Court found no genuine issue of material fact with respect to the alleged breach of his employment contract in the formal complaint stage, the Review Committee stage of his dismissal, the two faculty committee stages, and the Board of Trustees appeals stage of his dismissal. Id. at 944-50. Further, the Court found that the professor received procedural due process in connection with his termination. Id. at 950. He was entitled to the extensive disciplinary process outlined in his tenure contract and that process was fully afforded to him and more than adequately provided him with the essential requisites of notice and an opportunity to respond. Id.

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Maine

Legislation

- 26 M.R.S.A. § 666:
  The valid period for a certificate to pay a person with a disability less than the minimum wage upon petition was changed from one year to two years.

- 26 M.R.S.A. § 1192:
  This section dealing with unemployment benefits was amended in the following notable areas:
  - 2. An individual must actively seed work each week while filing a claim for benefits unless they are participating in an approved training program and provide evidence of work search efforts. Failure to provide such evidence results in a denial of benefits for that week absent a showing of good cause by the claimant for the failure.
  - 13. An individual must participate in reemployment eligibility assessment services when referred. Failure to participate when referred results in a denial of benefits until the individual participates.

Cases

- *Downing v. Department of Transp.*, 34 A.3d 1150 (Me. 2012)
  The Court determined that, "when the retiree presumption in 39 M.R.S.A. § 223 applies, an employee may nevertheless be entitled to workers' compensation benefits for a discrete period after retirement upon proof that the employee was unable to perform suitable work for that period." *Id.*

- *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 WL 6124120 (Me. Decided Dec. 11, 2012)
  The Court held that individual supervisors are not liable for employment discrimination under the Maine Human Rights Act (MHRA) and the Whistleblowers' Protection Act (WPA).

- *Levesque v. Androscoggin County*, 2012 WL 4707106 (Me. Decided Oct. 4, 2012)
  The Court held that, although "a plaintiff may use the doctrine of constructive discharge to satisfy the elements of 'discharge' or 'adverse employment action' in an otherwise actionable claim pursuant to section 4572 of the Maine Human Rights Act," Maine recognizes no independent cause of action for constructive discharge. *Id.*

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Massachusetts

Legislation

- M.G.L. c. 149, § 159C (effective January 31, 2013)
  This section dealing with the required disclosures for temporary workers was re-written and now requires a staffing agency to provide notice of:

  > "(1) the name, address and telephone number of: (i) the staffing agency, or the contact information of the staffing agent facilitating the placement; (ii) its workers compensation carrier; (iii) the worksite employer; and (iv) the department;
  >
  > (2) a description of the position and whether it shall require any special clothing, equipment, training or licenses and any costs charged to the employee for supplies or training;
  >
  > (3) the designated pay day, the hourly rate of pay and whether overtime pay may occur;
  >
  > (4) the daily starting time and anticipated end time and, when known, the expected duration of employment;
  >
  > (5) whether any meals shall be provided by the staffing agency or worksite employer and the charge, if any, to the employee; and
  >
  > (6) details of the means of transportation to the worksite and any fees charged to the employee by the staffing agency or worksite employer for any transportation services."

  Staffing agencies are required to post a notice of these rights. They are also prohibited from collecting fees from an employee for: registration or procurement of employment; any good or service absent written contract disclosing the voluntary nature of the purchase; provision of any bank card, debit card, payroll card, voucher, draft, money order, or drug screen in excess of the actual cost of said provision; a criminal record information request; transportation; or any good or service which would cause the employee to earn less than the applicable minimum wage.

  If optional transportation services to a work site are offered by a staffing agency, worksite employer, or person acting on behalf of either, any associated fee must not exceed the actual cost of the transport and may not exceed 3 percent of the employee's daily wages or reduce that wage below the applicable minimum wage.

  Staffing agencies are prohibited from: knowingly distributing false, fraudulent, or misleading information to an applicant; Using any name not registered with the department to advertise its services; place an employee by force or fraud, for illegal purposes, in violation of state or federal labor laws, or any site that is on strike or lockout without providing notice of this fact; or refuse to return personal property.

Violators of this section are subject to punishment or civil citation.

Cases

- *Case of Spaniol*, 81 Mass.App.Ct. 437 (2012)

  The court found that payments under settlement agreements are not within the scope of the payment-reduction provision of M.G.L. c. 152, §13A(10), which (in certain circumstances) permits a workers' compensation insurer who makes prompt payment of benefits to an injured employee to reduce the amount payable by the amount it statutorily owes to the employee's attorney. *Id.* Insurer's making payments under settlement agreements are not entitled to payment-reduction. *Id.*

- *Melia v. Zenhire, Inc.*, 462 Mass. 164 (2012)

  The forum selection clause in an executive employment agreement was found valid and not subject to the Massachusetts Wage Act's prohibition against special contracts that exempt employers from the Act's provisions. *Id.* at 169-70.

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Michigan

1. Legislation
   a. Right to Work -On December 11, 2012, Governor Rick Snyder signed Public Act 348 and Public Act 349 which have been described as "right to work" provisions into law in Michigan. Right to work is a political misnomer. The acts do not prohibit an employer or employee from entering into employment relationships. Rather, right to work laws take advantage of the exceptions found in the federal Labor Management Relations Act ("LMRA"), Section 14(b) which allows states to pass laws requiring membership in a labor organization. In effect, a "right to work law" only prohibits traditional union security laws establishing agency shops where dues or service fees are required to be paid by employees regardless of their actual membership in a union. Otherwise, private labor management relation laws are still governed by the comprehensive body of federal labor law.

      i. Act 348 prohibits an employer from entering into a contract with union security provisions or enforcing such provisions. Specifically the employers are prohibited from:

         (1) Requesting employees to join or resign from a union
         (2) Requiring an employee to become or remain a member of a union;
         (3) Pay dues, fees, assessments or other charges or expenses to a labor union;
         (4) Pay a charitable organization in lieu of paying such dues, fees or assessments

ii. The act makes any union security clause unenforceable. Further, a civil fine of no more than $500.00 is authorized upon proof of violation to the act. It also provides for a civil action for damages and award of attorney fees to a prevailing plaintiff.

iii. The act also restricts employees or other persons from forcing anyone to join or remain a member of the union, refrain from joining a union or pay dues, fees or charitable organizations in lieu of dues and fees.

b. Beginning January 1, 2013 it will be legal for Michigan employers to set up Work-Sharing programs that will help them avoid laying off employees during downturns. The programs will need to be rigidly crafted under the terms of the law. But they hold out the potential not only for employers to retain key employees in anticipation of better times ahead, but also to lower their future unemployment tax rates.

c. Michigan Professional Employer Organization Regulatory Act (“Act”) MCL 338.3721
  i. The following terms must be included in any PEO-client agreement executed after September 1, 2012:
    (1) The responsibility of the PEO and the client to pay wages, to withhold taxes, including unemployment taxes, and to make employee benefit payments for covered employees.
    (2) The responsibility of the PEO and the client to hire, discipline, and terminate employees.
    (3) The responsibility of the PEO and the client to comply withMichigan’s Worker’s Disability Compensation Act.

d. Public Act adopted to prohibit Michigan employers and universities from asking prospective employees or students to reveal their private e-mail passwords or provide access to their social media accounts. The bill is undoubtedly a response to the fact that some employers have begun to require employees and applicants to release of their private social media (e.g., Facebook, Link’d In) passwords for employer scrutiny. Violating the Social Network Account Privacy Act would be a misdemeanor. As of August 2012 Maryland and Illinois have passed similar legislation.

2. Pending legislation
  a. Michigan (S.B. 786) would invalidate any non-compete agreement entered into after an employment relationship begins. That prohibition would be in effect regardless of any change in the employee’s position or the provision of additional consideration by the employer in return for the promise not to compete for a reasonable period of time after the employment relationship ends.

3. Whistleblowers Protection Act
  a. Debano - Griffin v Lake County, 486 Mich 938
    i. Definition of "a law" for WPA purposes

  b. Wurtz v. Beecher Metropolitan Dist. (Mich.App.,2012
    i. The non-renewal of a contract may constitute an adverse employment action for purposes of the discrimination laws.

  c. Henry v. Laborers Local 1191 2012 WL 2579683, 5 (Mich.App.) (Mich.App.,2012)
    i. Plaintiffs' WPA claims are not preempted by NLRA

4. Discrimination
  a. *Brock v. Consumer Services, Inc.* 2012 WL 6177057, 4(Mich.App.,2012) - Reaffirmed that even after presenting a prima facie case of discrimination under the states civil rights act, a plaintiff must nevertheless “proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp. v. Green,*”

b. *Griffin v. Botsford Hosp.* 2012 WL 6035446, 2 (Mich.App.) (Mich.App.,2012) - In case of contractual limitation of statutory limitation period, the Court found that the following sentence: "I also understand that nothing contained in this application may be construed as a contract between the Botsford Health Care Continuum or its affiliates and myself, for either employment or the provision of any benefits." was not inherently ambiguous and thus must be enforced as written. *Id*

5. Disability
   a. Dimitrov v. Quest Diagnostics, Inc. 2012 WL 555767, 8 (Mich.App.) (Mich.App.,2012) - Where an impairment is temporary and relatively easily remedied, such an ailment is not a substantial limitation on any major life activity for purposes of PWDCRA.or FMLA

6. Wages and Hours
   a. MSX Intern. Platform Services, LLC v. Hurley 2012 WL 1890013, 1 (Mich.App.) (Mich.App.,2012) - A written policy does not grant a vested contract right to paid time off.

Mississippi

Statutory Changes

In 2012, Mississippi revised its workers' compensation laws in favor of employers. *See* Chapter 3 of Title 71 of the Mississippi Code. The law "shall not be presumed to favor one party over another." It also allows a partial reduction in payments to any worker who is injured on the job but had pre-existing conditions. The injured worker must provide medical proof to the employer of a direct causal connection between the work performed and the injury. The changes allow an employer, upon reasonable suspicion, to administer or demand drug and alcohol testing, and deny payment when a worker is found to be under the influence of alcohol or drugs when an on-the-job injury occurs. The employee bears the burden to prove that his or her intoxication was not a contributing cause of the accident.

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Missouri

Missouri Supreme Court Throws Out Missouri Approved Jury Instruction for Failure to Require Plaintiff to Prove the Essential Element of "Legally Disabled"

In Hervey v. Missouri Department of Corrections, the Missouri Supreme Court reversed and remanded the holding of a trial court because the verdict-directing instruction used did not require the jury to find an essential element of plaintiff's disability claim, namely, that she was legally disabled. Hervey v. Missouri Dept. of Corr., 379 S.W.3d 156, 157 (Mo. 2012). To state a claim for disability discrimination under the

Missouri Human Rights Act, a plaintiff must plead and prove (1) the plaintiff is legally disabled; (2) the plaintiff was discharged; and (3) the disability was a factor in the plaintiff's discharge. *See* Medley v. Valentine Radford Commc'ns, Inc., 173 S.W.3d 315, 320–21 (Mo. App. 2005). The Missouri Approved Instruction 31.24, as utilized by the trial court, required only a finding that:

> Second, (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability)* was a contributing factor in such *(here, repeat alleged discriminatory act, such as "failure to hire", "discharge", etc.),* and ...

While often the status of a plaintiff as a member of a protected class is not at issue, disability claims are often contested by defendants. The MAI verdict director, as written and used by the trial court in Hervey, did not submit as a separate hypothesized fact for the essential element that the plaintiff was actually a member of her particular, protected classification. Instead, the MAI allowed the fact finder to presume that a plaintiff's status as a member of a protected classification was not in dispute. Finding that the instruction used constituted reversible error, the Missouri Supreme Court held that the verdict-directing instruction for claims under the Missouri Human Rights Act must require the jury to find that Ms. Hervey was actually disabled under a separately enumerated paragraph.

** Note: A new MAI has yet to be released.

Trial Judge's Misstatement on the Issue of Causation under the Missouri Human Rights Act Constitutes Reversible Error

In Thomas v. McKeever's Enterprises, the Missouri Court of Appeals held that plaintiffs bringing claims under the Missouri Human Rights Act are not required to prove "but for" causation, and that an instruction to do so was reversible error. Thomas v. McKeever's Enterprises Inc., WD 73675, 2012 WL 4771364 (Mo. Ct. App. Oct. 9, 2012), reh'g and/or transfer denied (Nov. 20, 2012).

In Thomas, the Court provided the jurors with Missouri Approved Instruction 31.24 as the verdict director, which stated:

> "Your verdict must be for plaintiff if you believe:
> First, defendant discharged plaintiff, and
> Second, plaintiff's age was a contributing factor in such discharge, and
> Third, as a direct result of such conduct, plaintiff sustained damage."

During the Defendant's closing argument, however, Defendant's counsel argued that Plaintiffs were required to prove that "but for" Plaintiffs' age that they would still be working for Defendant. In Plaintiffs' rebuttal to Defendant's closing argument, Plaintiffs' counsel stated

> "I'm going to show you the prism through which you have to view the facts and all the circumstances of this case.... If this is our circle of facts, contributing factors—that language here in the instruction. There's this—I think [Defendant's counsel] used this but-for language, and I don't know where that comes from." Defendant's counsel objected on grounds that Plaintiffs' counsel had misstated the law. The trial court sustained the objection and issued the following oral curative instruction: "Ladies and gentlemen, I have sustained an objection to the last comment by counsel. Under the law, the [Plaintiffs] are required to prove that *but for* the—their age in this case, they would not have been terminated."

Plaintiffs first alleged that the trial judge had misstated the law in their motion for new trial, asserting that the trial court misdirected the jury with a curative instruction that was inconsistent with the language of the MAI 31.24 which had previously been given. The trial court denied Plaintiffs' motion, finding that its curative instruction did not misstate the law. Plaintiffs maintained on appeal that they were not required to prove "but for" causation, as the trial court stated in its curative instruction, rather, Plaintiffs needed only to establish that age was a "contributing factor" in Defendant's decision to terminate Plaintiffs'

employment. The Missouri Court of Appeal held that instructing juries on "but for causation" even when concerned about a misstatement of the law should be avoided because,

> "…while cause in fact is something juries are peculiarly well suited to decide, the legal formulation for cause in fact so as to determine the submissibility of the plaintiff's case is as complicated today as it ever has been and is not something that can easily or simply be explained or understood by lay jurors."

On this basis, the judgment of the trial court was reversed and remanded for a new trial.

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Montana

I. Statutory Changes
Montana legislature did not meet in 2012. Aside from a small increase in minimum wage (from $7.65 per hour to $7.80 per hour), there were no statutory changes to any employment related state laws in 2012.

II. Case Law

A. Privacy Issues
In employment cases involving an employee who was a civil servant, such as a police officer or firefighter, if an investigation is conducted by the employer into the employee's actions in relation to the alleged wrongdoing, the employee has no right of privacy to the information contained in the investigative reports. *Billings Gazette v. City of Billings*, 2011 MT 293, 362 Mont. 522, 267 P.3d 11. The case involved an investigation into allegations of misuse of a Billings Police Department credit card by an administrative employee of the department. An internal investigation produced a letter detailing the employee's responses to the allegations. The Billings Gazette requested a copy of the letter per Article II, § 9 of the Montana Constitution[2]. The Montana Supreme Court applied a balancing test, weighing the interest of the public in documents produced as a result of investigations into wrongdoing by government employees against those employee's individual rights to privacy. Noting that the investigation report in question was indisputably "a public document created and held by a public body," the Court determined that the document should be released. *Billings Gazette v. City of Billings*, 2011 MT 293 at ¶ 22. The Court indicated that a crucial factor in its determination was that the position held by the employee was a "position of trust." *Id*. The nature of her position was such that she did not have a reasonable expectation of privacy in relation to that position. The majority distinguished the case from *Montana Human Rights Division v. City of Billings*, 199 Mont. 434 (1982) because the employee in *Billings Gazette* was a public

[2] Right to know. No person shall be deprived of the right to examine or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. Mont. Const. art. 2, § 9.

employee who allegedly stole thousands of dollars from the city, and the Gazette was not requesting her entire personnel file, only specific information pertaining to the investigation. The Court ultimately determined that society would not be willing to recognize a reasonable expectation of privacy where a government employee stole money from the government.

B. Discrimination

In cases involving disability discrimination, an employer may not discharge an employee for safety reasons without actual and direct threat of injury. *Reinhardt v. Burlington Northern Santa Fe R.R.*, 846 F.Supp.2d 1108 (D. Mont. 2012). Any action taken by the employer must be based on a meaningful investigation into the alleged disability, including identifying possible accommodations, not on an employer's hypothetical fear. In *Reinhardt*, an employee was discharged for safety reasons because his gait was altered and coworkers thought he may have had a stroke. The employee received an evaluation after discharge stating that he should have no difficulty performing the duties required. The U.S. District Court for the District of Montana reversed and remanded, ruling that, if there is direct evidence of discrimination, the employer must show that there was no improper motive for the discharge or that there is legitimate evidence for it.

In another disability discrimination suit, the Montana Supreme Court applied the Americans with Disabilities Act and the ADA Amendments Act (ADA and ADAAA, respectively) in determining that obesity is a disability worthy of protection. *BNSF Railway Co. V. Eric Feit*, 2012 MT 147. The Court stated that "obesity that is not the symptom of a physiological disorder or condition may constitute a physical or mental impairment within the meaning of" the Montana Human Rights Act "if the individual's weight is outside the 'normal range' and affects 'one or more body systems.'" The word "disability" is not defined by the ADA, ADAAA, or the MHRA. The Court used language from the EEOC, which defines an impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1) (2011). The dissents objected to the use of language from the ADAAA that has not been adopted by the Montana legislature.

C. Covenants Not to Compete

Montana law strongly disfavors covenants not to compete in employment agreements. In *Wrigg v. Junkermier, Clark Campanella, Stevens, P.C.,* 2011 MT 290, the Montana Supreme Court determined that an employer cannot demonstrate that a restriction on the employee's post-termination employment is necessary to protect the employer's good will, customer relationships, or trade information if the employer ended the employment relationship with the employee. The fact of the employee's involuntary termination was sufficient to demonstrate that the employer did not have a legitimate business interest in the restrictive covenant.

D. Arbitration Provisions in Employment Agreements

The Montana Wrongful Discharge from Employment Act is applicable only in the absence of a contract of employment for a specified term. In *Marsden v. Blue Cross and Blue Shield of Montana*, Inc., 2012 MT 306, Shannon Marsden, an employee of Blue Cross and Blue Shield of Montana, Inc., had a two-year contract with her employer which included an arbitration provision. Blue Cross terminated Marsden and paid her the remaining amounts due under the contract, alleging that she failed to timely submit a response to a Request for Proposals to the State of Montana, resulting in the loss of a contract with the state. Marsden alleged that she was terminated in response to reporting violations of public policy in relation to rebating insurance commissions. The WDEA provides a remedy for termination of employment if termination occurs as a result of whistleblowing.

When Marsden attempted to contest her status as a contract employee based on the employer's retention of the right to terminate her employment if in the best interests of the company, and sue under the WDEA, Blue Cross argued that Marsden's status must be determined in an arbitration proceeding, not District Court. The Montana Supreme Court agreed, finding that whether the contract was for a specified term was appropriately determined in arbitration pursuant to the valid, jointly agreed arbitration provision of the employment contract.

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New Hampshire

Statutory Updates

1. Changes to NH RSA 281-A:64, Regarding Requirements for Safety Summary Filing and Joint Loss Management Committee Plans

There is a change to New Hampshire's Workers' Compensation Law, and the requirements that certain New Hampshire employers (1) maintain and file a written safety and health program, and (2) have a Joint Loss Management Committee. Effective January 1, 2013, the statutory requirements will only apply to employers with 15 employees or more. Under the old law, employers with 10 employees were required to have a written safety and health program, and file a Safety Summary form with the state Department of Labor biennially; additionally, employers with 5 or more employees were required to establish a joint loss management committee. The amendments to RSA 281-A:64 make it applicable to employers with <u>15</u> employees (rather than 10), and require that the Safety Summary form only be filed <u>once</u> (rather than biennially). Note that revised statute will also require that the written safety and health program be updated biennially. In practical terms, this means that small employers (those with 14 or fewer employees) are now excused from maintaining a written safety and health program, filing a Safety Summary form, or establishing a Joint Loss Management Committee. Larger employers (those with 15 or more employers) must still maintain a written plan and a Joint Loss Safety Committee, and although the plan needs to be periodically updated, it now only needs to be filed once.

2. Amendments to NH RSA 281-A:2, Distinguishing Between Independent Contractor and Employee

Generally, under NH law an employee is any "person who may be permitted, required or directed by an employer in consideration of direct or indirect gain or profit, to engage in employment." Until recently, the statutory test used to differentiate between independent contractors and employees has 12 parts. As of August 6, 2012, that test was streamlined, and reduced to 7 parts. The amended criteria made it (slightly) easier for a person to qualify as an Independent Contractor. Subparts (g), (h), (i), and (k) were removed from the applicable test, and prior subparts (e) and (f) were combined. Now, to be exempted from the definition of an "employee," an individual must meet <u>all</u> of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
(g) The person is not required to work exclusively for the employer.

Perhaps the most important change is to Subsection (e). The language regarding registration with the State as a business is new, and such registration can serve as additional persuasive evidence that a person or entity is in fact an Independent Contractor.

This amendment changes the definitions in NH's "Protective Legislation" (RSA 275:4 and 42), "Whistleblowers' Protection Act" (RSA 275-E:1), "Minimum Wage Law" (RSA 279:1), and Workers' Compensation statute (RSA 281-A:2). Note that the amended criteria is required to be posted in the same manner as other New Hampshire Department of Labor materials.

2. Enactment of NH RSA 275:70, Making Non-Competes More Difficult to Enforce

As of July 14, 2012, New Hampshire enacted House Bill 1270, under which employers must provide employees with copies of non-competition/no-piracy agreements (offered to potential employees or employees who are making changes in their job classifications) prior to or at the same time as the change in employment occurs. The brief entirety of the new statute reads: "Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable." Since keys terms are undefined, and there is considerable ambiguity over the scope of this new law and how it will be applied, tracking developments relating to NH RSA 275:70 will be of considerable importance to businesses using non-compete and non-piracy agreements.

Case Law

1. Statute of Limitations in Constructive Discharge Actions

In Jeffery v. City of Nashua, 163 N.H. 683 (2012), the Supreme Court of New Hampshire held that the State three-year statute of limitation began to run on the date of an employee's letter of resignation, rather than on the date of the employee's last day of work. In that case, the City's risk manager raised concerns over the municipality's budget, specifically in regard to the health insurance line item. Subsequently, the City discovered that the line item was in fact under-funded. The Plaintiff alleged that she refused to accept blame for the issue, since she had raised the problem with her superiors, and that as a result she received written warnings and a demotion. On December 21, 2006, the Plaintiff submitted a letter of resignation, indicating that her last day of work would be December 31, 2006. On December 29, 2009, three years and eight days later, the Plaintiff brought suit, alleging among other things a claim of constructive discharge. The City moved to dismiss the claim as untimely under New Hampshire's 3-year statute of limitations. The State Supreme Court held that the cause of action began to run when the Plaintiff gave notice of her intent to resign rather than on the actual last day of work. In this case, the constructive discharge claim was therefore deemed to be untimely and barred by the statute of limitations.

2. ERISA Preemption of State Whistleblower Law

In Appeal of A & J Beverage Distribution Inc., 163 N.H. 228 (2012), the Supreme Court of New Hampshire vacated a whistleblower award entered in an employee's favor by the New Hampshire Department of Labor, because it was preempted by ERISA. In that case, an employee opted out of a company health care plan because of increasing premiums. The employer required the employee to pay the premium for the month in which he made that decision, and deducted a pro-rate share of the premium contribution from his wages. The employee filed a wage claim for a refund of the premium amount and prevailed. Later, after the premium amount decreased, the same employee asked for additional insurance information from the employer, but was refused. Later, after making administrative inquiries, the employer provided the employee with the insurance information. The employee was subsequently terminated. He filed a whistleblower complaint with the State Department of Labor alleging that he was terminated in retaliation for his complaints about the health insurance plan. The Department of Labor ruled in favor of the employee, and the employer appealed. The employer argued that the State

whistleblower claims were preempted by ERISA, and Federal Courts have exclusive jurisdiction over such claims. The State Supreme Court agreed and vacated the administrative award, because the allegations related to a plan covered by ERISA.

3. Non-Compete Not Severable From Interdependent Sales Agreements

In Ellis v. Candia Trailers and Snow Equipment, Inc., ____ N.H. ____ (December 21, 2012), 2012 NH LEXIS 165, the Supreme Court of New Hampshire recently held that, in the context of case specific facts, a non-compete agreement could not be severed from companion agreements for an asset purchase and an inventory purchase, because the terms of each agreement made them inter-dependent. The case involved a sale of company specializing in the sale and installation of truck bed parts and accessories. The company sale was managed in several parts, through three different types of agreement, each executed on different dates and each supported by separate consideration. Later, the buyer alleged that the sellers breached the non-compete agreement, which triggered certain obligations under another agreement that the sellers allegedly ignored. In the civil action that followed, the trial court found the agreements to be severable, and ruled that the sellers breached the non-compete but the buyer breached an inventory purchase agreement; that ruling had a significant impact on how damages were determined. Ellis appealed, and the Court ultimately reversed, holding that the non-compete could not be split apart from the other agreements because "in one way or another, each agreement was contingent on the other two." The Court also held that the state Consumer Protection Act (NH RSA 358-A) did not apply to the case, because the transaction at issue constituted an isolated sale or event that was not pursued in the ordinary course of business.

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New Jersey

Flecker v Statue Cruises, LLC, 2012 WL 5499894 (NJ App. Div. 2012)

The plaintiff filed an action against his employer alleging violations of the New Jersey Wage and Hour Law. In response, the employer posted a memorandum directed to all employees informing them of the suit. The memo specifically identified plaintiff as the party responsible for filing the suit and advised employees that as a result, no employees would be scheduled for overtime. Immediately thereafter, plaintiff was confronted, threatened and harassed by coworkers. Eventually the harassment became so great that plaintiff resigned. Plaintiff then filed a claim of retaliation under the Conscientious Employee Protection Act (CEPA).

The matter was dismissed by the trial court via summary judgment. However, on November 14, 2012, the Appellate Division reversed this ruling and reinstated the case, noting there was sufficient evidence for a reasonable jury to conclude that the employer knew or should have known its memorandum would incite the plaintiff's co-workers and that such action could ultimately force the plaintiff to resign.

A.D.P. v. Exxonmobil Research and Engineering Company, 428 N.J. Super. 518 (App. Div. 2012).

The court considered whether summary judgment was properly granted to the defendant employer who required the plaintiff, a long-term employee with satisfactory job performance to submit to random alcohol testing which led to her termination for alcohol use. The basis for the commencement of the testing was a voluntary admission from the employee to her employer that she was an alcoholic and was in an inpatient rehabilitation center receiving treatment. The defendant, by its own policy, subsequently

required the plaintiff to undergo regular alcohol testing in the form of breathalyzer tests and mandated that she sign an agreement pledging to abstain from alcohol. When the plaintiff failed a random breathalyzer test, she was fired.

The Appellate Division found that because the employee's required breathalyzer test was based not on job performance or imposed on every employee regardless of disability, the employer in fact was engaging in discrimination.

N.J.S.A. 10:5-1 outlines that employers may not terminate a defendant on the basis of a disability. As alcoholism is a disability, employers are required to make reasonable accommodations for alcoholics.

<u>Cowher v. Carson & Roberts,</u> 425 N.J. Super. 285 (App. Div. 2012)
This is an action alleging violation of the New Jersey Law Against Discrimination. The plaintiff Myron Cowher, a former truck driver for Carson & Roberts Site Construction & Engineering Inc., sued the company and three supervisors after he allegedly was the target of anti-Semitic remarks for more than a year, upon the mistaken belief that he was Jewish. The comments included remarks that, “only a Jew would argue over his hours” and “if you were a German, we would burn you in the oven.”

The Appellate Division considered only whether he has standing to bring the claim, being that he is not Jewish. The suit had already been dismissed by the trial court on that same basis. The Appellate Division reversed the dismissal, holding that if the plaintiff can prove the discrimination “would not have occurred but for the perception that he was Jewish,” his claim can proceed.

The “proper question” in this case, the court said, is what effect the supervisors’ allegedly derogatory comments would have on “a reasonable Jew,” rather than on a person of Cowher’s actual background. This decision is significant because it expands the scope of who can bring a discrimination claim under the New Jersey Law Against Discrimination, by allowing a person to pursue a claim for discrimination based upon a protected characteristic not actually possessed by the person bringing the claim.

This decision shows just how broadly courts in New Jersey are willing to interpret the state anti-discrimination laws. The burden on employers to regulate conduct among co-workers is now higher than ever before.

<u>Cole v. Jersey City Medical Center</u>, 425 N.J. Super. 48 (App. Div. 2012)
The plaintiff, a former employee, brought an unlawful termination suit against her employer, the defendant. The defendant moved to enforce an arbitration clause contained in the parties’ employment agreement.

The Appellate Division held that the defendant was equitably estopped from enforcing an arbitration clause contained in an employment contract, because it actively participated in the litigation. More specifically, the defendant opted to wait until three days before trial to first invoke the arbitration clause. The Court reasoned that the defendant had "voluntarily and intentionally decided to relinquish its right to arbitration as a forum to adjudicate plaintiff's claims as a matter of litigation strategy."
Valeria Headen v. Jersey City Board of Education¸ 212 N.J. 437 (2012).

The plaintiff was a school food service worker, a career service position. She was employed by the defendant on a full-time ten month basis. The plaintiff filed suit against the defendant seeking current and future vacation during the school year pursuant to the Civil Service Act.

The New Jersey Supreme court held that the Civil Service Act’s (hereinafter the “Act”) paid vacation leave provisions apply to career service, non-teaching staff employees of school districts that have opted to be part of the civil service system, including ten-month employees such as the plaintiff. However, because the Act and its implementing regulations establish a floor for the amount of leave to be provided to such employees, and a collectively negotiated agreement provided Headen with more than the minimum paid vacation leave to which she was entitled under the Act, her claims were properly

dismissed. The court concludes that it “is acceptable to require career employees to use vacation time during scheduled breaks in the academic year.”

<u>Steven J. Winters v. North Hudson Regional Fire and Rescue</u>, 212 N.J. 67 (2012)
The plaintiff, a terminated firefighter, brought action against the defendant employer. The plaintiff alleged that the termination was retaliatory. The plaintiff was afforded disciplinary hearings before the Civil Service Commission, but declined to participate. The Commission made a determination that the plaintiff had forfeited his right to employment as a firefighter.

This matter raised significant and practical concerns about the intersection of administrative disciplinary proceedings and CEPA protections.

The New Jersey Supreme Court opined that when an employee and employer engage the system of public employee discipline established by law, and the employee raises a claim that employer retaliation at least partially motivated the decision to bring the charge or the level of discipline sought, both the employee and employer must live with the outcome, including its potential preclusive effect on related employment-discrimination litigation as a matter of the equitable application of estoppel principles. The CEPA claims were therefore properly dismissed.

<u>New Jersey Facebook Bill</u>
On September 20, 2012, New Jersey moved closer in joining the social media legislative bandwagon when The Senate Labor Committee voted 4-0-1 in favor of the “Facebook Bill.” The Senate Labor Committee approved two bills, S1915 and S1916, which are collectively referred to as the “Facebook Bills.” S1915 prohibits employers from requiring that applicants and employees divulge their social media passwords and S1916 prohibits colleges from doing the same for college applicants and students.

Companies could face the prospect of a $1,000 or $2,500 fine depending on if it is a first or second offense, and employees or prospective employees could sue for damages in the event they are denied employment or promotion because of an employer's prying into social media.

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New York

There are not many employment law changes in New York but the changes that were made are significant for employers.

<u>New York General Business Law</u>
On August 14, 2012, Governor Andrew Cuomo signed into law two amendments to the New York State Social Security Number Protection Law. The changes, which provide additional protections for employee social security numbers, were codified as Section 399-ddd of the New York General Business Law.

N.Y. Gen. Bus. Law § 399-ddd(1)(a) defines “social security account number” to include “the number issued by the federal social security administration and any number derived from such number” but does <u>not</u> include “any number that has been encrypted.”

The first amendment, effective November 12, 2012, prohibits the employment of inmates in any capacity that would allow access to the social security numbers of other people.

The second amendment, effective December 12, 2012, prohibits individuals and entities, not including the "state or its political subdivisions", from requiring a person to disclose his or her social security number, unless any of the enumerated exceptions apply. Notably, the prohibition does not apply where the individual consents to the acquisition or disclosure of their social security number or where the number is required by law or regulation. Further, disclosure may be required for purposes of employment, including in the course of the administration of a claim or benefit or for a "procedure related to the individual's employment." Of course, if the employer is granted access to the employee's social security number, the employer must abide by the other provisions of the law. For example, an employer may not require an employee to wear a badge with his or her social security number and may not require an employee to transmit his or her social security number over the internet, unless the connection is secure or the number is encrypted.

Failure to comply with these provisions will result in a fine of not more than $500 for the first violation and fines of up to $1000 for each subsequent violation.

New York Labor Law

In September, 2012, Governor Andrew Cuomo signed into law an amendment to New York's wage deduction statute, New York Labor Law §193. The amendment, which became effective November 6, 2012, permits New York employers to make a broader range of payroll deductions than previously allowed but imposes additional requirements on employers regarding such deductions.

The amendment now permits authorized deductions for a broad range of expenses. Most significantly, this amendment allows employers to make deductions to recover overpayment of wages due to a mathematical or other clerical error by the employer or to recoup a wage advance. Such deductions must comply with regulations promulgated by the New York State Department of Labor.

The statutory list of allowable wage deductions has been expanded to include:

- Prepaid legal plans;
- Purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent (20%) of the profits from such event are being contributed to a bona fide charitable organization;
- Discounted parking or discounted passes, tokens, fare cards, voucher, or other items that entitle the employee to use mass transit;
- Fitness center, health club, and/or gym membership dues;
- Cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college or university;
- Pharmacy purchases made at the employer's place of business;
- Tuition, room, board, and fees for pre-school, nursery, primary, secondary and/or post-secondary educational institutions;
- Day care, before-school and after-school care expenses; and
- Payments for housing provided at not more than market rates by non-profit hospitals or affiliates thereof.

Procedure for Deductions
The employer must receive written authorization for any wage deductions from the employee and the employer must retain the authorization during the term of employment and for six years after the employment ends. The employer must provide the employee with written notice of all terms and conditions of the deduction and keep the employee apprised of any "substantial change" in the deduction or manner in which it is made.

The amount of the deductions during a pay period must not exceed maximum amounts set by the employer and employee. The employer is required to provide employees with access to current account information detailing deduction expenses. The employee may revoke authorization for any and all payroll deductions at any time and the employer must comply within four (4) pay periods or eight (8) weeks, whichever is sooner.

This amendment is subject to a three-year sunset provision and will expire three (3) years from the effective date, unless renewed or extended by additional legislation.

Case Law

Bonus Payments
This is a "must read" case, especially if you are advising an employer on its handbook, the terms surrounding a bonus payment, or otherwise advising on an obligation to pay a bonus once an employee has been terminated.

In Ryan v. Kellogg Partners Inst. Servs., 19 N.Y.3d 1, 945 N.Y.S.2d 593 (2012), the Court of Appeals, *New York State's highest court*, upheld the enforcement of an oral contract for the payment of a bonus. Ryan accepted a position with Kellogg, a financial services start-up, and orally agreed to a compensation package of $350,000 which was split into a $175,000 salary and allegedly a guaranteed bonus of $175,000. Significant to his ability to ultimately prevail, Ryan made the bonus a condition of his accepting the employment opportunity with Kellogg.

After the oral "agreement" on compensation and bonus had been reached but before starting employment, Ryan signed an employment application and an employee handbook receipt, each of which included *at-will termination provisions and a statement that nothing in the handbook created a binding contract, and that compensation and benefits were also "at-will" and could be terminated at any time, with or without notice. The handbook failed to say that oral compensation agreements would not be enforceable, nor did it even mention bonuses, and in particular, did not clearly indicate that any bonuses were discretionary as Kellogg argued.* Ultimately, the Court found that there were no statements in the handbook that barred recovery on Ryan's breach of contract and Labor Law claims for unpaid compensation.

Ryan deferred his bonus payment for a year but Kellogg terminated him before he was paid. He sued alleging causes of action for failure to pay wages in violation of Labor Law §§ 190-198 and breach of contract. Kellogg claimed that Ryan's claims were barred due to his status as an at-will employee, that his compensation and benefits were subject to termination at any time, that the bonus was discretionary, and also claimed a statute of frauds defense under General Obligations Law § 5-1103.
The Court of Appeals affirmed the Appellate Division decision upholding the trial court's award of $379,956.65, consisting of the $175,000 awarded by the jury, statutory interest, and attorneys' fees and costs as the Court found the bonus constituted "wages" within the meaning of Labor Law § 190(1) and the failure to pay violated § 190(3) and entitled Ryan to the attorneys' fees under Labor Law § 198(1-a). The Court found that the bonus was earned and vested before Ryan was terminated, that the bonus was expressly linked to his labor or services personally rendered, and that its payment was guaranteed and non-discretionary as a term and condition of his employment, thereby distinguishing an earlier case, Truelove v. Northeast Capital & Advisory, 95 N.Y.2d 220, 715 N.Y.S.2d 366 (2000). The Truelove case upheld the right of an employer to decline to pay a bonus to an employee, even after the bonus had been promised and calculated, because the bonus plan explicitly predicated payment on the recipient's continued employment status and the employee did not satisfy that condition.

Case of First Impression—Pre-emption and New York's Workers' Compensation Law

In New York Hosp. Medical Center of Queens v. Microtech Contracting Corp., 98 A.D.3d 1096, 951 N.Y.S.2d 546 (N.Y. App. Div. 2012), the Second Department, Appellate Division held that the federal Immigration Reform and Control Act (IRCA), which requires an employer to verify an employee's immigration status, did not preempt New York's Worker's Compensation Law. The issue, one of first impression in New York, was whether an employer who violated the IRCA by hiring undocumented aliens was deprived of Workers Compensation protections.

The Defendant contractor employed two undocumented aliens to perform work on the Plaintiff Hospital's property. The employees were injured and the Defendant provided them with compensation pursuant to the Workers' Compensation Law. The employees then sued the Plaintiff hospital alleging violations of the Labor Law. The Plaintiff hospital brought an action against the Defendant contractor seeking contribution and indemnification. The Defendant moved to dismiss the complaint on the grounds that the claims for contribution and indemnification were barred by Workers Compensation § 11. The Second Department affirmed the dismissal of the complaint holding that federal law did not preempt the state's Workers' Compensation Law and that the Workers' Compensation Law precluded the Plaintiff's claims against the Defendant for contribution and indemnification.

Collective Bargaining Rights, Arbitration, and Layoff Clauses

In In re Arbitration between Johnson City Professional Firefighters Local 921, 18 N.Y.3d 32, 958 N.E.2d 899 (2011), the New York Court of Appeals, the highest court, considered whether a "no-layoff" clause in a firefighters' collective bargaining agreement was arbitrable. The clause stated: "The Village shall not lay-off any member of the bargaining unit during the term of this contract." The parties agreed that disputes concerning the interpretation of this clause would be resolved through arbitration. Subsequently, the Village voted to abolish six firefighter positions and the Union moved for arbitration. The lower courts granted the Union's application to compel arbitration and the Village appealed. The Court of Appeals reversed, finding that the termination of the six firefighters did not fall within the no-layoff clause and was therefore not arbitrable.

The Court emphasized that public policy requires that "job security" clauses be explicit, unambiguous and comprehensive and that where a municipality bargains away its right to make economic and budgetary decisions, all parties should be aware that this happening. Here, the Court observed, the "no-layoff" clause did not explicitly prohibit the Village from abolishing the firefighter positions for budgetary or economic reasons. As such, the terminations of the six firefighters did not fall within the clause and the dispute was not arbitrable for reasons of public policy.

The right of a town to adopt a local law setting forth disciplinary procedures for police officers different from those outlined in the collective bargaining agreement (CBA) and not allowing for arbitration was upheld in Town of Wallkill v. Civil Service Employees Ass'n, Inc., 2012 WL 5258298 (N.Y. 2012). Since 1995, a CBA had been in the place between the Town and the Police Officers Benevolent Association (PBA). In 2007, the Town adopted a local law which set forth disciplinary procedures different from those stated in the CBA. The local law does not allow arbitration and requires the Town Board to conduct a hearing on the disciplinary charges and issue a decision. The Court of Appeals upheld the local law, looking to earlier precedent which established that police discipline may not be the subject of collective bargaining where the Legislature has expressly committed disciplinary authority over a police department to local officials. The Court then pointed to Town Law § 155 which provides the Town with authority to make rules and regulations in police discipline matters. As such, the Court concluded "the subject of police discipline resides with the Town Board and is a prohibited subject of collective bargaining between the Town and Wallkill PBA."

NEW YORK CITY

In the spring of 2012, over the vetoes of Mayor Michael R. Bloomberg, the New York City Council passed two wage-related amendments to the Administrative Code of the City of New York.

On May 15, 2012, the Council voted to add Section 6-130 to the Code, which establishes a prevailing wage, as set by the City Comptroller, for building service employees in city leased or financially assisted facilities. On June 28, 2012, the Council approved new Section 6-134, which requires the payment of a living wage, $11.50 an hour or $10 an hour with benefits, to workers employed on property developed by recipients of City economic development financial assistance in the amount of $1 million dollars or more.

On July 27, 2012, Mayor Bloomberg filed a complaint in state court seeking a judgment declaring the wage laws invalid and enjoining their operation. Mayor Bloomberg's complaint alleges that the laws will harm the City's efforts to attract and generate economic activity and that the laws are preempted by state and federal laws and unlawfully infringe upon the Mayor's executive powers. The case is currently pending in New York Civil Supreme Court at Index Number 451114/2012.

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North Carolina

Statutory Updates

North Carolina's legislature passed a law in 2011 requiring employers and local governments to use the federal E-Verify system when hiring new employees. The effective date for cities and counties was October 1, 2011, but the compliance deadline for private sector employers depends on the size of the organization's workforce in North Carolina.

Employers with 500 or more employees in the state had until October 1, 2012, to begin using E-Verify. For those with 100-500 employees, the requirement became effective on January 1, 2013. Smaller employers with 25-100 employees have until July 1, 2013, to become compliant. Businesses will not be required to verify the employment eligibility of current employees or individuals in certain exempt industries, such as short-term agricultural workers. Also, because the law does not apply to companies with less than 25 employees, more than half of the state's employers will not be required to use E-Verify at all.

The North Carolina Department of Labor has jurisdiction to enforce the E-Verify program. To assist employers with compliance efforts, the agency has compiled a list of frequently asked questions and answers, which can be found at: http://www.nclabor.com/legal/e_verify/e_verify_faq.htm.

Case Law

Fatta v. M&M Properties Management, Inc., No. COA12-694 (N.C. App. 2012).

The plaintiff claimed that he was injured on the job just three days after being hired to manage a small hotel. Almost two weeks later, he notified the company of his injury, saying he planned to file a workers' comp claim. The very next day, the employer issued a first and final disciplinary warning for a variety of reasons, all of which were unrelated to the injury. Four days later, the plaintiff was discharged. The following week, he saw a doctor regarding his earlier injury, was diagnosed with a hernia, and filed a workers' comp claim. Later, he filed a lawsuit under North Carolina's Retaliatory Employment Discrimination Act (REDA), alleging that he was discharged in retaliation for putting the company on notice that he intended to file the workers' comp claim. The trial court dismissed the case prior to trial.

North Carolinas's REDA statute prohibits discrimination or retaliation against an employee for, among other things, filing a workers' comp claim. The North Carolina Court of Appeals determined that, although the plaintiff was discharged before he ever filed the workers' comp claim, the act of putting his supervisor on notice that he intended to file the claim was sufficient to constitute protected activity within the meaning of REDA. Unfortunately for the plaintiff, however, having jumped that hurdle he still had to show that his protected activity caused his termination.

The appellate court noted that the temporal proximity between the protected activity and the plaintiff's termination suggested a causal connection. That, alone, was not enough to establish causation, however, because the plaintiff still had to establish that a retaliatory motive was a substantial factor in the company's decision to discharge him. In that regard, the plaintiff could not sustain his burden. He admitted that he had been given a final warning for a number of legitimate reasons – including tardiness, excessive breaks, failure to learn workplace standards, inability to deal effectively with customers, and more – none of which had anything to do with his threat to file a workers' comp claim. The plaintiff was unable to show that the company's stated reasons were false and that retaliation was the real reason for his discharge. Thus, the appellate court ruled that, despite the close temporal proximity between the plaintiff's protected conduct and his discharge, dismissal of the case was proper because he was unable to establish a causal connection between the two.

Cole v. City of Charlotte, No. COA11-1307 (N.C. App. 2012).
This was a case in which the plaintiff alleged that her termination was unlawful because it was done in violation of North Carolina public policy. During her employment as an administrative assistant in the Charlotte city attorney's office, the plaintiff received average and below-average annual reviews and was reprimanded for two incidents.

The first incident involved the plaintiff's admitted use of her mother's handicap parking placard for her own convenience on several occasions. The second incident occurred four years later and involved reports by security officers at the Charlotte Government Center that the plaintiff had brought mace, which was classified as a prohibited chemical weapon, into the building. During the subsequent investigation, the plaintiff was uncooperative and gave inconsistent statements. Ultimately, she was warned that any future incidents indicating dishonesty or lack of integrity could result in her discharge.

Several months later, someone using an alias sent an e-mail to the mayor, city manager, and council members in which accusations were made against the city attorney and several individuals in his office. The e-mail specifically accused the city attorney's office of discriminating against black males in its hiring practices. When asked about the e-mail during the investigation, the plaintiff denied writing it and was very uncooperative.

Ultimately, it was determined that the plaintiff was the only person who could have sent the e-mail. She was the only staff member who worked directly with all of the people mentioned in it and she had raised similar complaints in the past. On that basis, the city attorney discharged her. The plaintiff subsequently brought a lawsuit in which she claimed that her termination violated North Carolina public policy because she had engaged in free speech under the state constitution.

The North Carolina Court of Appeals disagreed. It noted that in order to assert a claim for wrongful or retaliatory discharge in violation of her state constitutional right to freedom of speech she had to show that she actually engaged in protected speech or related activity and that such conduct was the motivating reason for her discharge. In this case, the plaintiff could not do that because she had consistently denied sending the e-mail, thereby making it impossible to prove that she had engaged in the protected speech in question. Also, even if the plaintiff had admitted that she sent the e-mail, there were ample legitimate reasons to justify her termination, including the parking and mace incidents and her refusal to cooperate with the investigation into the e-mail.

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Ohio

Statutes

Minimum Wage

The minimum wage in Ohio will rise 15 cents to $7.85 per hour in 2013. For tipped employees, the new minimum will be $3.93 per hour, an increase of 8 cents per hour. The state minimum wage is adjusted annually because of an amendment to the Ohio Constitution approved statewide by voters in 2006. The amendment links the minimum wage to the national Consumer Price Index as it applies to urban wage earners and clerical employees for a 12-month period ending each August.

The new year also will bring a slight change for companies that must pay a minimum wage. As of January 1, 2013 the wage will apply to businesses with annual gross receipts of at least $288,000, a $5,000 increase from 2012. Companies with gross receipts of less than $288,000 must pay the federal minimum wage of $7.25 an hour. The same rate applies to 14- and 15-year-old employees.

Senate Bill 337

On June 26, 2012 Gov. Kasich signed Senate Bill 337 into law. The law removes some of the restrictions connected to ex-criminal offenders searching for jobs. The statute attempts to reduce collateral sanctions for people with felonies; lifts occupational license restrictions; permits individuals to seal two misdemeanors, or one felony and one misdemeanor; creates a Certificate of Qualification for Employment to facilitate employment opportunities; allows the Ohio Bureau of Motor Vehicles to accept license reinstatement fees in installments; and seals certain juvenile crime records from public records searches.

OHIO CASE LAW

Smoke Free Act

***Wymsylo v. Bartec, Inc.*, 132 Ohio St. 3d 167 (Ohio Supreme Court May 23, 2012)**

In *Wymsylo*, the Supreme Court of Ohio determined that the Smoke Free Workplace Act ("Act") is a valid exercise of the state's police power by Ohio voters and does not amount to a regulatory taking. Zeno's Victorian Village, a privately owned bar in Columbus, was cited for violations of the Act on multiple occasions, and it sought declaratory judgment to challenge the constitutionality of the law.

The court noted that voters of Ohio have a legitimate purpose in protecting the general welfare and health of Ohio citizens and the workforce from the dangers of secondhand smoke in enclosed public spaces. By requiring that proprietors of public places of employment take reasonable steps to prevent smoking on their premises by posting "no smoking signs," removing ashtrays, and requesting patrons to stop smoking, the act is rationally related to their stated objective. The court concluded that Zeno's failed to establish that it was subject to an unlawful policy of strict liability, or that the act had a significant economic impact on business such that a regulatory taking existed.

Workers' Compensation/Retaliatory Discharge

***Lawrence v. City of Youngstown*, 133 Ohio St. 3d 174 (Sept. 20, 2012)**

Plaintiff Keith Lawrence worked for Defendant City of Youngstown. On January 7, the city suspended Lawrence without pay and discharged him two days later. That same day the city prepared and sent a letter to Lawrence notifying him of the discharge of his employment.

If an employee has a claim for retaliatory discharge for filing a workers' compensation claim, the employee has 90-days immediately following the discharge to put the employer on notice. Generally, discharge is effective the date the employer issued the notice of employment termination, not the date of the employee's receipt of that notice. Lawrence sent notice more than 90 days after the date of discharge. However, he claimed he did not become aware of his discharge until February 19 and argued that his notice should be deemed timely.

The Supreme Court of Ohio created a limited exception to this 90-day requirement for an employee who does not become aware of his discharge within a reasonable time after the discharge occurs, and could not have learned of the discharge within a reasonable time in the exercise of due diligence. In this case, the 90-day limit commences on the earlier of the date the employee becomes aware of the discharge or the date the employee should have become aware of the discharge. The court found an implicit affirmative responsibility on an employer to provide reasonably prompt notice of a discharge. This is consistent with the Revised Code, does not burden employers, is not unreasonable, and is something that rationally flows from act of the discharge of an employee. Although the city sent notice to Lawrence, there is no indication the city sent a certified letter, had a face-face or oral notification of discharge. Thus, the city did not definitively demonstrate reasonably prompt notification. Without reasonably prompt notification of discharge, Lawrence had unwarranted difficulty providing the required notice letter to the city within the 90-day notice period.

Voluntary Removal from the Workforce

***State ex rel. Rouan v. Indus. Comm'n of Ohio*, 133 Ohio St. 3d 249 (Ohio Supreme Court Oct. 11, 2012)**
Appellant Patricia Rouan began receiving temporary total disability compensation ("TTC") in 2004 after hurting her leg at work. Months later she filed a disability-retirement application with the Ohio Public Employees Retirement System claiming her inability to work based exclusively on "major depressive disorder" unrelated to her leg injury. After the retirement application was approved, Rouan applied for, and was denied, permanent total disability compensation ("PTD"). She then unsuccessfully sought additional TTC. Rouan challenged the Industrial Commission's denial of this claim.

In affirming the Commission's determination, the Supreme Court of Ohio noted that in assessing whether an employee's retirement bars a subsequent request for TTC, two considerations predominate: (1) was the retirement precipitated by the workplace injury and (2) did the claimant remain in the work force after retiring? Because Rouan had voluntarily abandoned the work force when she took disability retirement for a condition unrelated to her workplace injury, she was ineligible to receive TTC.

Noncompete Clause Expiration

***Acordia of Ohio, L.L.C. v. Fishel,* 2012 Ohio 4648 (Ohio Supreme Court Oct. 11, 2012)**
Plaintiff Acordia of Ohio, an insurance agency, filed suit seeking damages and injunctive relief against four former employees of violation of noncompete agreements and misappropriation of trade secrets. Acordia is the product of various corporate mergers, and all of the non-compete agreements were signed with Acordia's predecessor companies. The Supreme Court of Ohio determined that as a matter of law a resulting company possessed the right to enforce the noncompete agreements at the time it merged as if it had stepped into the shoes of the absorbed companies that had entered the contracts. The Court emphasized that its ruling is narrow, reaching only non-compete agreements. It also expressly recognized that whether a particular non-compete agreement is reasonable remains open to dispute.

No Public Policy Wrongful Termination Claim Premised on First Amendment Against Private Employer

***Barnett v. Aultman Hosp.*, 2012 U.S. Dist. LEXIS 156073 (N.D. Ohio Oct. 31, 2012)**
Plaintiff sent an email to current and former co-workers celebrating that her supervisor had been fired. Unfortunately for plaintiff, the supervisor was not actually terminated, and the email message was

forwarded to the supervisor. After an investigation, plaintiff was confronted with the email, but she denied having authored it, explaining instead that someone must have hacked into her account. As the investigation unfolded, unbeknownst to the investigating officials, plaintiff sought FMLA leave. Soon after, she was terminated for dishonesty pursuant to the employee handbook. The court granting summary judgment in favor of the employer on plaintiff's wrongful termination claim premised on public policy protecting freedom of speech because the First Amendment applies to governmental actors only.

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Oklahoma

Statutory Updates

1. The **Oklahoma Drug and Alcohol Testing Act** was amended in 2012, with a new provision governing (1) discharge for refusal by an employee to undergo drug or alcohol testing and (2) discharge for a confirmed positive test. See 40 O.S. §2-406.1. The provision contains various provisions concerning the effect of a discharge under these circumstances: (1) an employee discharged for refusal to undergo a drug or alcohol test (conducted in accordance with the Act), will be considered to have been discharged for "misconduct" and will not be eligible for unemployment benefits; (2) the employee bears the burden of proving a breach in the chain of custody in any challenge to the positive drug/alcohol test; (3) the employer must provide documentation of the chain of custody; (4) when the employee fails to request a confirmation test, the claimant shall not be entitled to unemployment benefits; and (5) a written report of the test results shall be *prima facie* evidence of the administration and results of the testing. *Id.*

2. The **Oklahoma Drug and Alcohol Testing Act** was also modified to include various new or amended provisions, in response to previous case law interpreting the Act: (1) the 2011 amendments eliminated criminal consequences for non-compliance; (2) the statute of limitations was shortened from two years to one year for actions alleging willful violations of the Act; (3) in a civil action for violation of the Act, the employee must establish that the employer had a "specific intent to violate the act"; (4) the scope of recoverable damages for violation of the Act was limited to lost wages plus an equal amount as liquidated damages, with reductions for amounts that could have been earned by the employee in the interim with reasonable diligence; (5) employers were granted the option of using non-enumerated methods of drug-testing; (6) employers were allowed to contract for the right to drug test contractors and subcontractors; and (7) when implementing new drug test policies, employers need only give 10 days notice (instead of 30). See 40 O.S. §551 *et seq* (*abrogating, in part*, *Estes v. ConocoPhillips*, 2008 OK 21, 184 P.3d 518).

3. The **Oklahoma Anti-Discrimination Act** was amended in 2011, to outline the requirements of a cause of action for "employment-based discrimination." The amendment abolished all common law causes of action for discrimination (previously known as the "*Burk*-tort"). The modification/amendment was likely precipitated by the Oklahoma Supreme Court's puzzling and confusing development of the common law in this arena. *See, e.g., Eapen v. Dell*, 2007 WL 2248170 (W.D. Okla. 2007) (noting Oklahoma Supreme Court's decisional law had "created uncertainty for litigants and the courts"). The amendment requires an aggrieved party to file a charge of discrimination with the Oklahoma Human Rights Commission or the EEOC within 180 days of the date of the alleged discrimination. After an agency investigation, the party may request a Notice of a Right to Sue, which *must* be obtained prior to the initiation of any civil action. Following receipt of such a Notice, the employee has 90 days to

commence a civil lawsuit. In such a lawsuit, the employer may use any defense available under the federal anti-discrimination acts. As a remedy for such discrimination, the district court may award injunctive relief, as well as back-pay and an additional amount as liquidated damages (reduced by amounts that could have been earned in the interim by reasonable diligence on the part of the employee). See 25 O.S. §1350.

4. **Intentional Tort Exception to Worker's Compensation Exclusivity**. Oklahoma case law had developed an intentional-tort exception to the exclusivity of the worker's compensation system for workplace injuries. In *Parret v. UNICCO Serv. Co.*, 127 P.3d 572 (Okla. 2005), the Court adopted a lessened burden of proof in cases where an employee argues that an employer "intended" to cause an employee's injury (for purposes of escaping worker's compensation exclusivity). The Court held the employee could establish an intentional tort by showing that the employer acted with knowledge that an injury was "substantially certain" to result from the employer's conduct. Following a rash of cases that were permitted to move forward under this new theory, the Oklahoma Legislature intervened and, pursuant to statutory law adopted in 2010 and 2011, an employee must now show that he or she was injured as a result of the "willful, deliberate, specific intent" of the employer to cause such injury. 85 O.S. §302(B). The new statute explicitly rejected the "substantial certainty" test, and states that the issue of whether an act is an "intentional tort shall be a question of law for the Court." *Id.*

5. Elimination of **Oklahoma Human Rights Commission**. The Oklahoma Human Rights Commission was established in 1963 to implement the Legislature's mandate to remove discrimination from the workplace. In 2011, the Legislature passed Senate Bill 763, which merged the OHRC into the Oklahoma Attorney General's office. All duties and responsibilities of the OHRC were assumed by the AG's office as of July 1, 2012.

Case Law Updates

1. **Arbitration of employment disputes**. In *Howard v. Nitro-Lift Technologies*, 2011 OK 98, 273 P.3d 20, the Oklahoma Supreme Court determined that, despite the existence of an arbitration clause in an employer-employee contract, it was for the district court – and not the arbitrator – to decide the validity of the covenant not to compete pursuant to Oklahoma's law concerning such covenants. On November 26, 2012, the U.S. Supreme Court unanimously reversed this holding, thereby abrogating the Oklahoma Supreme Court's historical analysis of such disputes, and noted that the Oklahoma Supreme Court had "disregard[ed]" the Court's precedent on the Federal Arbitration Act (FAA). 130 S. Ct. 500, 503 (2012). The U.S. Supreme Court held that, under the FAA, 9 U.S.C. § 1, it was for the arbitrator – and not the district court – to decide, in the first instance, whether the covenant not to compete was valid. Once a valid arbitration agreement exists, all other questions – including questions concerning the validity of the underlying contract – are for the arbitrator. The U.S. Supreme Court rejected the Oklahoma court's determination that the specific state statute addressing the validity of covenants not to compete in the employment context (15 O.S. §219A) governed over the "general" law relating to arbitration, and noted that such an interpretation was contrary to the Supremacy Clause of the U.S. Constitution. *See also High Sierra Energy v. Hull*, 2010 OK CIV APP 96, 241 P.3d 1139 (referring employment dispute to arbitration because "ambiguities are to be resolved in favor of arbitration . . .").

2. **Retaliatory Discharge.** In *Johnson v. St. Simeon's Episcopal Home, Inc.*, 2012 OK CIV APP 6, 270 P.3d 197, *cert. denied*, the Oklahoma Court of Appeals decided that when a fired employee should not have been hired under the law, then the employee's alleged retaliatory discharge claim should fail. In that case, a nurse's aide was hired by the defendant and was injured on the job, and thereafter filed two different workers' compensation claims. Thereafter, the employer learned that the plaintiff had previously been convicted of dealing cocaine (and other drugs) in another state, and terminated her employment (despite the existing workers' compensation claims). The plaintiff sued for retaliatory discharge under Oklahoma statutory law. However, the defendant pointed out that the Oklahoma Nursing Home Care Act allowed the defendant to conduct a background check on its employees at any time and that it was *not permissible to hire* an applicant convicted of narcotics violations, and was *required to discharge* an employee pursuant to the statute. The employee should never have been hired in the first place. For that reason, the employer was permitted to fire the employee without suffering liability for retaliatory

discharge. *Id.* at ¶14 ("Johnson is asking St. Simeon's to violate the law by continuing to employ her. The Nursing Home Care Act did not leave St. Simeon's with any choice but to terminate Johnson.").

3. **Unemployment Benefits**. In *Evans v. Oklahoma Employment Security Commission*, 2011 OK CIV APP 9, the Oklahoma Court of Civil Appeals heard a case involving a claim for unemployment benefits by the Chief of the Consumer Health Service for the state Department of Health. In that case, the employee was terminated for a conflict of interest. In particular, he was responsible for overseeing the Oklahoma tattoo industry, and his son happened to own a tattoo business. The record contained several allegations where the claimant allegedly abused this policy. The Court of Civil appeals held that he was not terminated for "misconduct" and was therefore entitled to unemployment compensation benefits.

4. **Worker's compensation benefits: psychological injury**. In *City of Norman v. Helm*, 2012 OK CIV APP 106, 2012 WL 6645036 the claimant had worked for a fire department for 15 years, and allegedly suffered Post-Traumatic Stress Disorder and depression. According to the Court, pursuant to 85 O.S. § 308(13)(f), the Oklahoma's Workers' Compensation Act limits recovery for mental injuries as follows: "'Compensable injury' shall not include mental injury that does not arise directly as a result of a compensable physical injury, except in the case of rape or other crime of violence which arises out of in the course of employment." Based upon the statutory definition and an earlier Supreme Court decision, the Court of Appeals agreed with the City and found that the claimant's injuries were not compensable, as they were purely mental in nature.

5. **Worker's compensation benefits: course of employment**. In *Yzer, Inc., v. Rodr*, 2012 OK 50, 280 P.3d 323, the plaintiff was a computer programmer for the employer, but suffered a heart attack while doing lawn work for his employer on the employer's premises. The fact that the employee may have volunteered to perform such duties (and that they were not his assigned tasks) did not preclude a finding that his injury was "in the course and scope of employment." The Court held that the work performed by the claimant was for the "benefit or interest" of the employer, as the employer asked for volunteers to help with yard work. Because the claimant was performing a special task for the employer, his accidental injury arose out of and was within the course of his employment and he was entitled to workers' compensation benefits. In *Hac, Inc., v. Box*, 2010 OK 89, 245 P.3d 609, the Court reviewed a case where a seventeen year old injured his right arm during a scuffle with a co-employee at the employer-grocery story. The Court held that the injury arose out of "horseplay," and was not within the course and scope of employment, and that he was therefore not entitled to workers' compensation benefits. "[I]njury caused by horseplay done independently of and disconnected from the performance of any employment duties does not arise out of employment . . . [A]n employee who is injured by a co-employee's prank or horseplay is an innocent victim and entitled to workers' compensation . . . if there is proof that the injured employee did not initiate the prank or horseplay and did not voluntarily participate in the prank or horseplay, or that the injured employee's only involvement in the horseplay incident was exclusively directed at escaping or avoiding the horseplay" *Id.* at ¶11.

6. **Oklahoma Anti-Discrimination Act.** In *Fulton v. People Lease Corp.*, 2010 OK CIV APP 84, 241 P.3d 255, *cert. denied*, the plaintiff sued her employer, her supervisor and personnel company, alleging gender discrimination, sexual harassment, hostile work environment and retaliation. The plaintiff alleged she was subjected to sexual threats and internet pornography, and alleged that her male co-employee made inappropriate and offensive sexual comments in her presence. The claims against the supervisor and the personnel company were the only ones at issue on appeal. The Court of Civil Appeals determined that the Anti-Discrimination Act did not allow for individual employees to be held personally liable under the Act. The Court also determined, however, that at-will employees may be protected against the tortious interference of an economic relationship (here, as against her supervisor). Finally, the Court held that a fact question existed on whether the personnel company that referred the plaintiff to the employer could be held liable (as an "employer") under the Act.

7. **Exhaustion of Administrative Remedies.** In *Jones v. State*, 2011 OK 105, 268 P.2d 72, the Oklahoma Supreme Court held that, pursuant to the statutory language at issue, the Oklahoma Standards for Drug and Alcohol Testing Act, 40 O.S. §551-553, permitted a classified state employee to

file an action in district court prior to the exhaustion of administrative remedies. Following the *Jones* decision, the Legislature modified the statute further, requiring a party aggrieved by a willful violation of the Act to bring their claim within one year of the alleged violation.

8. **Employee Privacy**. In *Oklahoma Pub. Employees Assoc. v. State*, 2011 OK 68, 267 P.3d 838, the Court held that the statutory language contained in Oklahoma Open Records Act indicated that the Legislature intended to provide a *non-exclusive* list of examples of information for which certain privacy interests were implicated, and that where a claim was made that disclosure of such information would constitute a clearly unwarranted invasion of personal privacy, "application of a case-by-base balancing test is utilized to determine whether personal information is subject to release." In that particular case, the Court held that release of employee birth dates or employee identification numbers would constitute a clearly unwarranted invasion of personal privacy pursuant to 52 O.S. §24A.7(A)(2).

9. **Sovereign immunity.** In *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, an employee of a tribal enterprise filed a claim in the Oklahoma Worker's Compensation Court. The Court held that the tribe, itself, enjoys sovereign immunity regarding such claims and is not subject to jurisdiction of the workers' compensation court, but that the workers' compensation insurer did not enjoy such immunity and was estopped to deny coverage under a policy for which it accepted premiums computed in part on the employee's earnings. In *Dilliner v. Seneca-Cayauga Tribe of Oklahoma*, 2011 OK 61, 258 P.3d 516, the Court held, in an employment-contract dispute, that the tribe had not expressly and unequivocally waived its sovereign immunity with respect to certain employment contracts entered into with tribal employees, and therefore the district court lacked subject matter jurisdiction.
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Pennsylvania

Act 6 of 2011 was signed into law on June 17, 2011. The new law makes significant changes to Pennsylvania's Unemployment Compensation Law.

First, Act 6 ensures the continuation of a federally funded, 13-week extension of unemployment compensation benefits. This prevents approximately 45,000 unemployment compensation claimants in Pennsylvania from losing their eligibility to collect an additional 13 weeks of benefits as of June 11, 2011. It also enables an additional 90,000 claimants in Pennsylvania to remain eligible throughout the remainder of the calendar year to collect the additional 13 weeks of extended benefits.

Though the new law extends unemployment benefits in Pennsylvania for an additional 13 weeks, it also makes it more difficult for new claimants to qualify for such benefits and reduces the amount of benefits claimants may draw if they do so qualify.

Act 6 freezes the maximum weekly benefit rate at $573 per week until the end of 2012, and allows only marginal increases in the maximum weekly benefit rate until 2018, or until Pennsylvania's Unemployment Compensation Fund is no longer in financial distress.

The new law also increases the minimum weekly qualifying benefit rate from $35 to $70, preventing claimants whose weekly benefit rate is less than $70 from drawing unemployment benefits. A claimant's weekly benefit rate is calculated based on the wages s/he was paid in his/her base year.

In order to qualify for unemployment benefits, claimants also must have worked a sufficient number of "credit weeks" during the previous base year. Current law provides that a credit week is any week in which claimants had earnings of $50 or more. Act 6 requires that claimants earn at least $100 for every credit week until December 31, 2014, and at least 16 times the Pennsylvania minimum wage rate for every credit week after January 1, 2015. The new law doubles the minimum credit week requirement through 2014, and at a minimum, quadruples it in 2015, which will prevent many claimants who would currently qualify for unemployment benefits from qualifying for such benefits in the future. The new law also increases the number of credit weeks necessary to qualify for benefits from 16 to 18.

In addition, Act 6 requires that claimants now undertake an active work search for suitable employment in order to qualify for benefits. Currently, there is no job search requirement for the regular 26-week state unemployment compensation program. To meet the new active work search requirement, claimants must:

1. Register for the employment search services offered by the Pennsylvania CareerLink system, or its successor agency, within 30 days of their initial application for benefits;

2. Post a resume on the system's database, unless they are seeking work in an employment sector in which resumes are not commonly used; and

3. Apply for positions that offer employment and wages similar to those they had prior to their unemployment and which are within a 45 minute commuting distance.

The work search requirements do not apply to claimants whose employers have laid the claimants off due to lack of work, and have advised the claimants of a date on which the claimants will return to work.

In addition to changes in the law's eligibility provisions, Act 6 also includes a severance pay offset and provisions mandating automatic relief from charges for employers under certain circumstances. The Act delays the beginning of unemployment benefits until the exhaustion of severance pay exceeding 40 percent of the annual average wage. Current law does not address severance pay in the computation of benefits.

Under the Act, severance pay is defined as "one or more payments made by an employer to an employee on account of separation from the service of the employer, regardless of whether the employer is legally bound by contract, statute or otherwise to make such payments." Severance pay does not include payments for pension, retirement, or accrued leave, or payments of supplemental unemployment benefits. The effective date of the Act's offset provision is January 1, 2012.

In addition to allowing an employer to offset severance pay against its obligation to pay workers' unemployment benefits, Act 6 also allows employers automatic relief from charges for ineligible claims, without the need for filing a written request with the Department, where a claimant is ultimately determined to be ineligible for benefits.

Act 6 also establishes shared work program. The program allows employers to voluntarily avoid layoffs by reducing the number of hours worked by employees in a specifically defined unit, which, in turn, allows employees in the affected unit to receive partial unemployment benefits for the reduced hours. The Act provides, however, that if any employee in an affected unit is covered by a collective bargaining agreement, the shared-work plan for that unit must be approved in writing by the employee's collective bargaining representative prior to its implementation.

Finally, Act 6 permits either party to an unemployment compensation benefit appeal hearing to testify (at the hearing) via telephone, without regard to the distance of the hearing location. Currently, the law provides that parties may request telephone testimony; that referees may or may not grant the request; and that the requesting party must reasonably demonstrate an inability to personally testify due to compelling employment, transportation or health issues.

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Rhode Island

Legislation

- Minimum Wage was raised to $7.75 per hour from $7.40 per hour commencing January 1, 2013. R.I. Gen. Laws § 28-12-3.

- R.I. Gen. Laws § 28-14-19:

  Violations of R.I. General Laws chapter 28-12 ("Minimum Wages") were brought under the enforcement powers and duties of the director of labor and training in addition to violations of chapter 28-14 ("Payment of Wages"). The enforcement powers and duties of the director were revised and clarified. They currently authorize investigation of any alleged violations of chapters 28-12 and 28-14 and require a hearing where such complaints are found to be just and valid. Said hearing is to be conducted by the director or a designee. At the close of the hearing the complaint may be dismissed or payments of any award, wages, or benefits found to be due may be ordered. A further penalty in an amount up to two times the total wages of benefits found to be due may be imposed and will be split between the aggrieved party and the department. The director has the power to institute an action under this section without the consent of the affected employee(s). Employer/employee agreements to work at less than the applicable wage are not a defense to actions under this section.

- R.I. Gen. Laws § 28-14-19.1:
  Misclassification of employees (independent contractor vs. employee) is a violation of chapter 28-14 under this new section. Penalties for violations of this section shall include a civil penalty between $500 and $3,000 for each misclassified employee and up to $5,000 for subsequent offenses. The penalty is to be divided equally between the department and the aggrieved party.

- R.I. Gen. Laws § 28-14-19.2:
  This section creates a private right of action for due wages or benefits and violations of chapters 28-12 and 28-14. An aggrieved party may recover unpaid wages or benefits, compensatory damages, and liquidated damages up to two times the amount of unpaid wages or benefits as well as an award of equitable relief, including reinstatement of employment, fringe benefits and seniority rights, and reasonable attorney's fees and costs.

- R.I. Gen. Laws § 28-14-19.3:
  This section provides protection from retaliation for any actions taken under chapters 28-12 and 28-14 or assistance in any investigation there under. Any retaliatory action is subject to R.I. Gen. Laws §28-50 ("Wistleblowers' Protection Act") and must be commenced within a year of accrual.

Cases

- *Olamuyiwa v. Zebra Atlantek, Inc.*, 45 A.3d 527 (R.I. 2012)
  The entry of summary judgment in an employment discrimination suit was held not to constitute a judgment settling claims of discrimination for purposes of § 28-5-24.1(d) requiring an attestation that any waiver of attorneys' fees was not compelled.

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Texas

Texas Workers' Compensation Act

In *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238 (Tex. 2012), the Texas Supreme Court addressed the exclusive remedy defense under the Texas Workers' Compensation Act (TWCA) for temporary workers. A temporary worker may be covered by both the staffing company and client company's workers' compensation policies if the temporary worker is proven to be an employee of each company and both companies subscribe to workers' compensation insurance. Therefore, both the staffing company and client company can take advantage of the exclusive remedy provision of the TWCA. The employee's family, however, argued that the employee was not covered by the client company's workers' compensation insurance because he was a temporary worker. The Court explained that an employer could not split its workforce by choosing coverage for some employees but not all, except in three limited circumstances, which did not apply to the employee.

In *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012), the Texas Supreme Court considered a reviewing court's subject matter jurisdiction to resolve an impairment rating appeal. Only one impairment rating was presented during the administrative proceedings. However, the impairment rating was determined to be invalid because it was not based on the proper guidelines. TEX. LAB. CODE § 410.306(c) states that new information regarding impairment ratings will not be allowed on appeal and the trier of fact "shall adopt" one of the impairment ratings previously presented. The Texas Supreme Court held that § 410.306(c) does not limit a court's subject matter jurisdiction; it merely limits what that court may review on appeal. Further, the Court opined that the reviewing court could reverse and remand to

the agency if no valid impairment rating was presented in the original proceedings rather than adopt an invalid rating.

Similarly in *DeLeon v. Royal Indemnity Co.*, No. 10-0319, 2012 Tex. LEXIS 972 (Tex. Nov. 16, 2012), the Texas Supreme Court determined that the reviewing court may remand back to the agency if there is no valid impairment rating for the court to adopt.

In *Manbeck v. Austin Independent School District*, 381 S.W.3d 528 (Tex. 2012), the Texas Supreme Court determined that a school district is immune from an award of attorney's fees for injured employees. A school district is a governmental entity with sovereign immunity. Sovereign immunity may be raised on appeal because it impacts a court's subject matter jurisdiction. The Political Subdivisions Law makes portions of the TWCA applicable to school districts. However, the TWCA is only applicable to the extent authorized by the Texas Tort Claims Act, which does not provide for an award of attorney's fees.

The Texas Supreme Court addressed the validity of Insurance Code, Deceptive Trade Practices Act (DTPA), and common law breach of the duty of good faith and fair dealing claims for workers' compensation claims in *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012). The Court reviewed the procedural process and requirements for a TWCA claim to determine if such secondary claims were consistent with the legislative intent of workers' compensation litigation. First, the Texas Supreme Court determined that claims against workers' compensation insurers for unfair settlement practices may not be made under the Insurance Code because the TWCA provides sufficient procedures for penalties and dispute resolution for an insurer's actions. Second, the Court determined that a claim may be brought against the insurer under the Insurance Code for misrepresentation of their policies because the cause of action does not contradict the TWCA process. Lastly, the Texas Supreme Court overruled their opinion in *Aranda v. Insurance Co. of North America*, and determined that a cause of action for beach of the duty of good faith and fair dealing is not applicable to a workers' compensation claim because it negates the purpose of the TWCA. **This essentially destroys most bad faith causes of action in Texas.**

In *Texas Mutual Insurance Co. v. Morris*, No. 09-0495, 2012 Tex. LEXIS 901 (Tex. Oct. 26, 2012), the Texas Supreme Court held that delays in requesting a benefit review conference by the claimant does not rid the court of jurisdiction as the TWCA is silent as to timing for such requests. The Court also noted that there is no time requirement for interlocutory orders and delays in connection with contested case hearings. Delays in requesting action are not jurisdictional matters. Further, the Texas Supreme Court again declared that causes of action for unfair claims settlement practices under Insurance Code § 541.060 and breach of the common law duty of good faith and fair dealing do not apply to workers' compensation claims.

Attorney-Client Privilege

In *In re XL Specialty Insurance Co.*, 373 S.W.3d 46 (Tex. 2012), the Texas Supreme Court considered whether the attorney-client privilege extends to the employer/insured for a workers' compensation claim under the TWCA. The Court held that the privilege does not extend to the employer based on Texas Rule of Evidence 503. Texas Rule of Evidence 503(b)(1)(C) applies where there are multiple parties involved in litigation that have a common interest. The Texas Supreme Court calls it the "allied litigant" privilege. The allied litigant privilege requires communication be made during litigation between any parties to the litigation. The privilege only applies when parties have separate counsel. Because the employer is not a party to a workers' compensation claim and is not separately represented, the allied litigant privilege does not protect communications between the insurer and the employer. Further, there is no insurer-insured privilege. **No privilege protection for correspondence between counsel chosen by the carrier and the employer.**

At-Will Employment

In *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012), the Texas Supreme Court held that the threat of firing an at-will employee for not agreeing to waive a jury trial is not coercion. The Court reasoned that the employer has a legal right to fire an at-will employee for any reason including a change in

employment terms. Therefore, the jury trial waiver signed by the employee as a result of the threat was valid and should be enforced.

Vicarious Liability

In *Arvizu v. Estate of Puckett*, 364 S.W.3d 273 (Tex. 2012), the Texas Supreme Court considered whether two employers could be held vicariously liable for the negligence of an employee when one controlled the details of the employees work and the other controlled the details of the specific mission. The Court held that both employers could be held vicariously liable due to their agency relationship. The employee worked directly for the first employer. The first employer was hired by the second employer for a specific purpose. Therefore, the Texas Supreme Court determined that both employers were liable for the employee's actions when performing the specific mission. The employee was a "subagent" in the agency relationship.

Wrongful Termination

The Texas Supreme Court determined that a plaintiff in a *Sabine Pilot* action may recover punitive damages in *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655 (Tex. 2012). First, the Court determined that a *Sabine Pilot* action sounds in tort, not contract. It was reasoned that an at-will employment relationship is not contractual because "the promise of continued employment is illusory." Therefore, an exception to the at-will doctrine could not be based on contract. Second, the Texas Supreme Court determined that since a *Sabine Pilot* action is a tort, then punitive damages are available to the plaintiff if there is a finding of actual damages and malicious conduct. The malice requirement for punitive damages requires a showing "by clear and convincing evidence that… [the employer] intended or ignored an extreme risk of some additional harm (like interference with…future employment, harassment, or terminat[ion]…knowing it was unlawful)." The malicious conduct must relate to the firing of the employee.

Texas Commission on Human Rights Act

The Texas Supreme Court addressed elements of a *prima facie* age discrimination claim and jurisdictional requirements for a discrimination claim under the Texas Commission on Human Rights (TCHRA) in *Mission Consolidated Independent School District v. Garcia*, 372 S.W.3d 629 (Tex. 2012). First, the Court held that a *prima facie* claim for age discrimination requires (1) membership in the protected class under the TCHRA, (2) qualification for the employment position, (3) termination by employer, and (4) replacement by someone younger.

The Court then analyzed whether failure to allege the elements of a *prima facie* age discrimination claim implicates jurisdiction or the merits of the claim. Under the *McDonnell Douglas* framework for employment discrimination claims, "the plaintiff is entitled to a presumption of discrimination if she meets the 'minimal' initial burden of establishing a prima facie case of discrimination." Therefore, the Texas Supreme Court reasoned that the effect of failing to allege a *prima facie* case of age-discrimination is loss of the presumption of discrimination provided by *McDonnell Douglas*.

However, the Texas Supreme Court also determined that the *prima facie* case impacts the court's jurisdiction if the employer is a governmental entity because of sovereign immunity. Sovereign immunity is only waived when "the plaintiff actually states a claim for conduct that could violate the TCHRA." Therefore, failure to allege a *prima facie* claim for age-discrimination means a court has no jurisdiction against immune governmental entities.

In *Prairie View A&M University v. Chatha*, 381 S.W.3d 500 (Tex. 2012), the Texas Supreme Court determined that the federal Lilly Ledbetter Fair Pay Act (Ledbetter Act) does not apply to the TCHRA. Section 21.202 of the TCHRA requires that a claimant must file a claim within 180 days of the discriminatory employment decision. The Court previously held that the 180-day limitation period begins when the discriminatory decision is made, not the manifestation of the discriminatory decision. The United States Congress passed the Ledbetter Act as an amendment to Title VII in 2009, which provided that a discriminatory pay decision occurs every time a paycheck is received instead of only when the initial decision is made. The Texas Legislature has not enacted a similar provision for the TCHRA. The Texas Supreme Court declared that the TCHRA, although similar, does not automatically incorporate amendments to Title VII. Legislative action must occur for the TCHRA to include any amendments.

Further, the Court determined that the 180-day filing requirement is a mandatory statutory prerequisite that must be complied with for a court to have jurisdiction to hear the claim. Therefore, failure to file with in the required time period divests the court of subject matter jurisdiction to hear the claim.

Negligent Hiring

In *Wansey v. Hole*, 379 S.W.3d 246 (Tex. 2012), the Texas Supreme Court determined that a negligent hiring claim requires that the plaintiff's injury be proximately caused by the harmful or negligent conduct of an employee who was hired pursuant to the defendant's negligent hiring practices. The damages alleged must be more than simply economic damages based on a breach of contract.

Claims by Medical Providers against Employer

In *Texas West Oaks Hospital v. Williams*, 371 S.W.3d 171 (Tex. 2012), the Texas Supreme Court held that a claim of a medical provider employee against a medical provider employer for injuries regarding inadequate training and supervision are health care liability claims under the Texas Medical Liability Act (TMLA). The Court determined that the term "claimant" in the TMLA included employees working as medical providers. The Court stated that a departure from safety standards in the form of negligent training or supervising can be the basis of a heath care liability claim. Further, the Texas Supreme Court held that this interpretation of the TMLA does not contradict the TWCA because it merely provides an alternative route to employees of nonsubscribing employers.

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Utah

A recent Utah Court of Appeals decision affirmed previous Utah jurisprudence that singular "off-handed," albeit offensive, comments by employees do not necessarily constitute unlawful employer discrimination, thereby invoking the protection of Utah's anti-retaliation statute.

In *Darvish v Labor Com'n Appeals Bd.* the plaintiff was an Iranian-born woman of Persian descent. During the course of her employment, a nearby co-worker once made the comment to a co-worker, "these Persians cannot come in here and tell us what to do." The plaintiff alleged that she was later terminated as retaliation for complaining about the comment, and thereby opposing workplace discrimination. The Court of Appeals noted that the anti-retaliation statute "does not protect employees from all retaliation, but only retaliation against an employee for opposing an employer practice viewed reasonably and in good faith as prohibited by the Act." *Darvish v Labor Com'n Appeals Bd.,* 2012 UT App 268, ¶ 29, 273 P.3d 953. The Court held that the single comment at issue in *Darvish* did not constitute workplace discrimination. The comment, while offensive, was not threatening, humiliating, or otherwise severe, and did not interfere with the plaintiff's work performance. "In short, the comment is most accurately described as an 'off-hand comment,' 'an isolated incident,' or 'a mere offensive utterance'—precisely the type of conduct that the Supreme Court held no one could reasonably believe constituted unlawful *employer* discrimination." *Id.* at ¶ 37.

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Vermont

Vermont Statutory Changes

Minimum Wage Update
Vermont's minimum wage increased on January 1, 2013 from $8.46 per hour to $8.60 per hour. For tipped employees, the increase was from $4.10 per hour to $4.17 per hour. The monthly amount in wages and tips must equal or exceed the equivalent of $8.60 per hour, or the employer must compensate the employee for the difference.

Employment Practices: Credit Information
In 2011, the Vermont legislature enacted a new employment practices statute regarding employees' or potential employees' credit information. The statute became effective on July 1, 2012. It prohibits an employer from refusing to hire or recruit, discharge, or otherwise discriminate against an employee or potential employee based on that individual's credit report or credit history. 12 V.S.A. § 495i. In addition, an employer may not inquire about such information. The statute includes exemptions for various circumstances, most notably for employment that involves access to confidential financial information, and for employment with financial institutions or credit unions. In addition, there are exemptions for law enforcement officers, emergency medical personnel, and firefighters, as well as those positions that require financial fiduciary responsibility to the employer.

Vermont Case Law Update

Mixed-motive Discrimination in the Workplace
A former Vermont state trooper brought an employment discrimination claim, which was disposed in the trial court on summary judgment. *Lamay v. State*, 2012 VT 49, ¶ 1 (Jun. 14, 2012). The plaintiff had admitted to violating state police policy by filing a report containing factual errors and inaccuracies. *Id.* at ¶ 2. After accepting a letter of reprimand, her conduct again underwent an internal investigation into false and inaccurate statements regarding a traffic stop and drug seizure. *Id.* Once the investigation began, plaintiff asked a co-worker to dispose of marijuana in her desk that she indicated was a "loose end." *Id.* At the conclusion of the investigation, plaintiff was terminated.

Following plaintiff's termination, her supervisor made comments about plaintiff being a single mother with "problems with day care," that she was sometimes late due to child care issues, and that she was "sometimes not…available for call outs because of this need to care for her child." *Id.* at ¶ 4. Plaintiff provided this as evidence of discrimination. *Id.*

While the court noted that gender bias may be demonstrated by evidence of stereotyping single mothers and mothers with young children, the court found that in this instance, there was insufficient evidence to show that gender, or gender stereotyping, was a motivating factor in the termination decision. *Id.* at ¶¶ 9-10. The remarks made by plaintiff's supervisor may suggest a stereotyped attitude or hostile environment, but they "do not necessarily demonstrate an illegitimate motive sufficient to require the employer to prove that its decision was based on legitimate criteria." *Id.* The court found that the comments "were essentially descriptive of actual problems plaintiff had with childcare…and do not convey the kind of invidious gender stereotyping that has been found sufficient to show discriminatory motive." *Id.*

Accrual of Paid Time Off and Sick Time during Leave
A plaintiff brought suit under the Vermont Parental and Family Leave Act (VPFLA), alleging that pursuant to the statute, she was entitled to accrue paid vacation and sick time during the course of her unpaid leave. *Vermont Human Rights Com'n v. State, Agency of Transportation*, 2012 VT 45, ¶ 1, 49 A.3d 149. The VPFLA provides for continuation of "employment benefits for the duration of the leave at the level and under the conditions coverage would be provided if the employee continued in employment

continuously for the duration of the leave." 21 V.S.A. § 472(c). The term "benefit" is not defined by statute.

The trial court equated accrual of vacation and sick time to pay; because an employee's right pursuant to the Vermont statute is to unpaid leave, no entitlement to accrual of paid time exists. *Id.* at ¶ 3. The Vermont Supreme Court rejected the employee's contention that the plain language of "employment benefits" includes accrual of paid leave. *Id.* at ¶ 4. Because the statute only provides for unpaid leave, paid time accumulation was not determined to be consistent with the purpose of the statute. The court accordingly held that time accrual was not a "benefit" that needs to be continued under the statute. ¶ 4. Under the VPFLA, an employee has a stator right to use their accrued paid time during the course of their leave, but that time does not extend the statutory period of twelve weeks of unpaid leave. 21 V.S.A. § 472(b).

Off-Duty Criminal Conduct Does Not Disqualify Employee from Receiving Unemployment Compensation

The Vermont Supreme Court held that an employee discharged for criminal conduct was not prohibited from receiving unemployment compensation under the applicable Vermont statutes. *Mohamed v. Fletcher Allen Health Care*, 2012 VT 64, -- A.3d --, 2012 WL 3239255 (Aug. 10, 2012). A hospital employee was terminated after he pled guilty to lewdness charges for groping a young woman, which occurred off hospital premises. *Id.* at ¶ 2. The employer argued that such conduct disqualified the former employee from receiving unemployment compensation due to the statutory disqualification provision for "gross misconduct connected with his or her work." *Id.* at ¶ 5; 21 V.S.A. § 1344(a)(2)(B). The court focused on the statutory phrase "connected with his or her work" and held that because the conduct took place off the employer premises, the disqualification did not apply. 2012 VT 64, ¶ 12.

As one justice pointed out in his dissent, the decision creates a bright line rule that off-premises conduct is not gross misconduct under the statute. *Id.* at ¶ 23. In this case, the hospital discharged the employee based on its obligation to keep its patients safe, among other sound business reasons. Even so, the conduct was not "connected" with the employee's work, because it took place off-duty and off-premises.

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Virginia

Case Law Update

1. *Bowman* Wrongful Discharge Claims

***Lester v. TMG, Inc.*, ___F.Supp.2d ___, 2012 WL 4052373 (E.D.Va. 2012)**

In *Lester*, the plaintiff was employed "developing business" for the Defendant. Lester alleged that he was recruited by Defendant's President and CEO, who represented that he would receive a specified salary, bonuses, and commissions. The Plaintiff, however, alleged that he never received compensation for the bonus plan. When he complained in an email to the CEO that the Defendant had not paid him pursuant to the purported compensation agreement, he was terminated.

Virginia is an at-will employment state, meaning that an employee may be terminated at any time. However, an employee may bring a wrongful discharge claim (*Bowman* claim) if the termination violates Virginia's public policy. Here, the Eastern District of Virginia found that Virginia's Wage and Payment Act, Va.Code Ann. § 40.1–29, expresses Virginia's public policy that an individual's right to compensation

implicates a property right which is actionable. Accordingly, the Court held that there is a valid wrongful discharge claim when a plaintiff alleges that he was terminated after complaining that he was not compensated in violation of the public policy of the Virginia Payment of Wages Law.

***VanBuren v. Grubb*, ___ Va. ___, 733 S.E.2d 919 (2012)**
This case arose from the Fourth Circuit Court of Appeal's order of certification requesting that the Virginia Supreme Court exercise jurisdiction to answer the following question:

> Does Virginia law recognize a common law tort claim of wrongful discharge in violation of established public policy against an individual who was not the plaintiff's actual employer, such as a supervisor or manager, but who participated in the wrongful firing of the plaintiff?

In *VanBuren*, the plaintiff was employed as a nurse by Virginia Highlands Orthopedic Spine Center, LLC, from December 2003 to March 2008. Soon after she joined the practice, she alleged she was subjected to sexual harassment by her supervisor and Virginia Highland's owner, Dr. Stephen Grubb. Dr. Grubb would "hug her, rub her back, waist, breast and other inappropriate areas, and attempt to kiss her." Although the plaintiff objected, she alleged the harassment continued throughout her employment.

In March 2008, Dr. Grubb suggested that VanBuren leave her husband so that she "could accept his love for what it was and what it could be." A few days later, Dr. Grubb called the plaintiff into his office and asked whether she planned to stay with her husband. When she responded in the affirmative, he terminated her employment with Virginia Highlands.

In addition to a Title VII claim, the plaintiff asserted a claim for wrongful discharge against Dr. Grubb, individually, and Virginia Highlands. In doing so, she alleged that she had been discharged from Virginia Highlands in violation of Virginia public policy, because she had refused to engage in criminal conduct—specifically, adultery in violation of Code § 18.2–365 and open and gross lewdness and lasciviousness in violation of Code § 18.2–345.

Virginia "strongly adheres to the employment-at-will doctrine" unless a claim falls under the narrow exception that the discharge violates Virginia public policy. A claim that a plaintiff's discharge was based on the employee's refusal to engage in a criminal act falls within this exception. Accordingly, the Court held that the plaintiff sufficiently pleaded a *Bowman* wrongful discharge claim against her employer because of her refusal to engage in the criminal acts of adultery and lewd and lascivious cohabitation.

With respect to her claim against Dr. Grubb, individually, the Court held that in a wrongful discharge case, the tortious act is not the discharge itself, but rather, the discharge becomes tortious by virtue of the wrongful reasons behind it. Thus, the Court concluded that when the tortious reasons for the unlawful actions of the supervisor effect the discharge, he should share in liability. Accordingly, the Supreme Court of Virginia held that a supervisor can be individually liable for the wrongful discharge of an employee when the reasons for the discharge violate public policy.

2. Family Medical Leave Act

***Ainsworth v. Loudoun County School Board*, 851 F.Supp.2d 963 (E.D.Va. 2012)**
The plaintiff was employed by the Loudon County School Board from 2001 until June 21, 2010, as a Teacher's Assistant and Behavioral Assistant at various schools. In 2008, the plaintiff accepted a Behavioral Assistant position which was a promotion. She received positive performance evaluations during this time.

The plaintiff took approved FMLA leave from March to June 2008 when she was diagnosed with a brain tumor. She underwent brain surgery in the summer of 2008, and was approved for FMLA leave from August 27, 2008 to December 1, 2008, and then granted a leave of absence from December 2, 2008 to January 27, 2009.

The plaintiff was medically cleared to return to work part-time on January 5, 2009, with the goal of returning full time in four months. During the spring and summer of 2009, the plaintiff asked her supervisors whether she would be returning to a classroom position. She was assured that she would return to the classroom. However, the defendants filled her position, and returned her to a teacher's assistant position for the 2009-2010 school year at a reduced salary. During this time, the plaintiff took approximately 89 days of FMLA leave for her medical condition. Following the 2009-2010 school year, and despite receiving assurances that she would be offered a contract for the next school year, the plaintiff was not offered an employment contract for the 2010-2011 school year.

The plaintiff filed suit against the School Board and her supervisors, individually, alleging that she was subject to retaliation in her demotion and eventual termination in violation of the FMLA. The plaintiff sought to hold the individual government employees individually liable for violating the FMLA.

The Eastern District of Virginia recognized that there is a split of authority as to whether public employees qualify as "employers" and may be held individually liable under the FMLA. The Fifth and Eighth Circuits have concluded, based on the statutory text, that public employees may be sued in their individual capacities under the FMLA if they act directly or indirectly in the interest of their employer—for example, by exercising hiring and firing authority. *See* *Modica v. Taylor,* 465 F.3d 174, 184–87 (5th Cir.2006); *Darby v. Bratch,* 287 F.3d 673, 681 (8th Cir.2002). The Sixth and the Eleventh Circuits have concluded that government employees cannot be individually liable. *See* *Mitchell v. Chapman,* 343 F.3d 811, 825–33 (6th Cir.2003); *Wascura v. Carver,* 169 F.3d 683, 685–87 (11th Cir.1999). The Fourth Circuit has yet to rule on the issue.

In analyzing the case law and FMLA statutory language, the District Court held that, despite the individual liability provision and the public agency provision being located in two distinct clauses within the statute, a "plain reading of the statute" indicates that public employees who act directly or indirectly in the interests of their employer may themselves be considered "employers" and subject to suit in their individual capacities under the FMLA. Accordingly, the Court held that government supervisory employees may be liable in their individual capacities under the FMLA.

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Washington

LAW
Washington Legalizes Same-Sex Marriage
On November, 2012, Washington voters approved same-sex marriage in Washington state. Under the Marriage Equality Act, a valid same-sex marriage from another state would be recognized as a marriage in Washington. Individuals married in other states who move to Washington would need do nothing more to have the marriage recognized. Similarly, a couple in a validly formed domestic partnership from another state would be treated as having the same rights and responsibilities in Washington as married spouses. To retain that status, the couple would have to marry within one year after becoming permanent residents of Washington State, unless at least one of the partners was at least 62 years of age.

For Washington State employers, the Marriage Equality Act will create only limited changes as Washington was the first state in the country to adopt "everything but marriage" domestic partner rights in 2009. Under the "everything but marriage" law, the terms "spouse, marriage, marital, husband, wife,

widow, widower, next of kin and family" apply equally to married couples and state-registered domestic partnerships under all aspects of Washington law, apart from the definition of marriage. Thus, the registration provides the same benefits and obligations that apply to spouses under Washington law, including the right to use sick leave to care for each other, the right to workers' compensation benefits, and the right to unemployment and disability insurance benefits. The Marriage Equality Act would be somewhat more expansive in its coverage, however, as it would not require that those who marry must share a home, which currently is a requirement to register as Washington domestic partners.

In terms of health benefits, the Act is unlikely to have any impact, apart from a change in terminology from domestic partner to spouse. Employers should check with their insurance brokers, however, to see if there are any changes to plans, policies, enrollment forms or other issues related to purchased insurance benefits. Employers should also take this opportunity to review their non-insured employee benefits that provide spousal coverage (including self-insured health benefits) to determine whether any terminology or substantive changes are appropriate or required.

Washington's Minimum Wage Increase
Effective on January 1 2012, Washington's minimum wage increases to $9.04 per hour (currently it is $8.67 per hour). Washington now has the highest state minimum wage in the nation.

Seattle Paid Sick Time and Paid Safe Time Ordinance
Effective on September 1, 2012, nearly all private sector employers must provide to employees who work in Seattle specified amounts of accrued, job-protected paid time off for personal illness, family care and other purposes. Businesses less than two years old are exempt from the requirements.

The ordinance requires all employers with at least five full-time employees to provide paid sick and safe leave to employees who work at least 240 hours annually in the City of Seattle. The new law prohibits retaliation against employees who use their accrued leave. Employees must be allowed to use paid sick leave for their own or a family member's physical or mental condition or for preventive care. In addition, employees must be allowed paid safe leave when the employee's place of business is closed by a public official due to hazardous material, to care for a child whose school or daycare is closed by a public official for that reason, or for reasons related to domestic violence, sexual assault, or stalking. Employers with at least five employees (tier 1 employers) must provide five days of accrued paid sick and safe leave annually; one hour of leave accrues for every 40 hours worked and employees must be allowed to carry up to 40 hours of accrued but unused leave to the next calendar year. These mandated accruals and carryovers increase with employer size. An employee must work in Seattle more than 240 hours in a calendar year to be eligible, but non-eligible employees are still considered in determining an employer's tier size.

Seattle joins San Francisco, Washington D.C., Connecticut, and potentially Denver, in mandating that employers provide a paid time off benefit.

CASES
***Anfinson v. FedEx Ground Package Systems, Inc.*, 172 Wn. 2d 1001 (2012)**

Washington adopts the "economic realities test" for determining whether a worker is an independent contractor or an employee under the federal Fair Labor Standards Act.
A number of different tests have been applied to distinguish between employees and independent contractors. The Washington Supreme Court recently held that the "economic realities" test used under the federal Fair Labor Standards Act also applies to cases brought under the Washington Minimum Wage Act. The "economic realities" test includes six factors: (1) the permanence of the working relationship between the parties; (2) the degree of skill the work entails; (3) the extent of the worker's investment in equipment or materials; (4) the worker's opportunity for profit or loss; (5) the degree of the alleged employer's control over the worker; and (6) whether the service rendered by the worker is an integral part of the alleged employer's business.

Anfinson and two other drivers filed a class action lawsuit against FedEx Ground Package System, Inc., on behalf of themselves and approximately 320 other FedEx Ground drivers. Although Anfinson and the other drivers signed independent contractor agreements, they alleged that they were employees for purposes of the Washington Minimum Wage Act and should have been paid overtime wages. After a four-week trial, the jury decided that the drivers were independent contractors and not employees. Anfinson and the drivers appealed, and Division I of the Washington Court of Appeals reversed the trial court's decision. The Washington Supreme Court accepted review and agreed with the Court of Appeals. The Washington Supreme Court held that the trial court had given the jurors the wrong legal standard by which to determine whether the drivers were independent contractors or employees. In concluding that the "economic realities" test was the proper standard for distinguishing between employees and independent contractors under the Minimum Wage Act, the Washington Supreme Court gave considerable weight to the fact that the Minimum Wage Act was patterned after the Fair Labor Standards Act. It also recognized that most federal courts have adopted the "economic realities" test when classifying the status a worker under the Fair Labor Standards Act.

***Washington State Nurses Association v. Sacred Heart Medical Center*, 287 P.3d 516 (2012)**

Washington imposes an overtime obligation with respect to missed rest breaks in that does not appear to exist in other states.

Washington's meal and rest break regulation, WAC 296-126-092, requires employers to provide a 10-minute paid rest break to non-exempt employees for every four hours of work, and non-exempt employees cannot be required to work more than three hours without a paid rest break. The regulation also requires employers to provide a 30-minute meal period to non-exempt employees for every five hours of work, between the second and fifth working hour. Meal periods may be unpaid, but are compensable when, for example, the employee is required by the employer to remain on duty.

In *Washington State Nurses Association v. Sacred Heart Medical Center*, a nurse and her union brought a class action on behalf of 1,200 registered nurses, seeking overtime pay for missed rest breaks under the Washington Minimum Wage Act. The nurses' collective bargaining agreement required the hospital to provide paid 15-minute rest breaks for every four hours of work. When nurses worked through their rest breaks, they submitted a "Missed Break Request" form and were paid 30 minutes of straight-time pay—15 minutes for their work during the rest break period, and 15 minutes for missing the paid rest break.
The nurses argued that they were entitled to an overtime premium, not just straight-time compensation for each missed rest break. They brought their claims solely for overtime under the Washington Minimum Wage Act, and the court held that the claims did not require interpretation of the collective bargaining agreement.

The Washington Supreme Court held that the missed opportunity to rest constituted "hours worked" for which overtime was due. Although the nurses did not actually work more than 40 hours in the week, their work during their rest breaks was viewed as being equivalent to tacking on 10 minutes of additional "hours worked" per missed rest break. As a result, the hospital owed the nurses overtime premium compensation for the first 10 minutes of each missed 15-minute break, or five additional minutes beyond the straight-time compensation the hospital had already paid. The court therefore reversed the trial court's award of double damages, finding that there was a "bona fide" dispute because the employer complied with the collective bargaining agreement.

This decision has imposed an overtime obligation with respect to missed rest breaks in Washington that does not appear to exist in other states. In light of these recent developments, employers with Washington employees should audit their meal and rest break practices and consult with counsel to ensure compliance. Examples of issues to consider include: (1) strategies to ensure that employees are taking meal and rest breaks; (2) strategies for documenting the provision of paid rest breaks on an "intermittent" basis; (3) methods for reporting missed meal and rest breaks; (4) proper calculation of pay for missed meal and rest breaks; and (5) implementation of meal break waivers.

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West Virginia

West Virginia is an at-will employment state, meaning that an employer may terminate an employee or take other adverse employment action against an employee for any reason or no reason at all, provided that the reason does not violate the public policy of West Virginia. West Virginia has enacted a statutory scheme for addressing impermissible discrimination in the work place, public or private, and in other contexts. This law is called the West Virginia Human Rights Act, and is found at West Virginia Code § 5-11-1 et seq. The West Virginia Act is not preempted by federal law dealing with the same issues. However, the West Virginia Act is to be construed to coincide with the prevailing application of Title VII under the federal Civil Rights Act. Henager v. Sears, Roebuck & Co., 965 F. Supp. 833 (N.D. W.Va. 1997). Any inconsistencies default to application of the West Virginia Act.

The declared public policy underlying the Human Rights Act is to guarantee equal opportunity in the area of, among other things, employment without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. The denial of these rights to properly qualified individuals by reason of race, religion, color, national origin, ancestry, sex, age, blindness or disability has been declared to be contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society. W.Va. Code § 5-11-2.

Claims process
The West Virginia Human Rights Act sets forth the procedure for filing a complaint with the West Virginia Human Rights Commission, but also permits a common law tort case to be filed against the employer. A claimant need not exhaust his or her administrative remedies before filing a civil action based on discrimination. The statute of limitations for filing a complaint with the Human Rights Commission is one year, and for civil cases, the limitations period is two years.

Employers subject to the Act
The provisions of the West Virginia Human Rights Act are applicable to employers with twelve or more employees within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place.

Powers of Commission
The Human Rights Commission has the power to, among other things, issue cease and desist orders against any employer covered by the Act who is found, after a public hearing, to have violated the provisions of the Act or rules of the Commission. Included with this power is the authority to award damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity. Such damages, contemplate only “incidental” awards. In Bishop Coal Co. v, Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989), the court approved $1,000 as an incidental award for such damages, and cautioned

that, although the figure may be adjusted for inflation or other considerations, the commission must be aware of its jurisdictional limitations because awarding a higher amount impinges upon a defendant's constitutional right to trial by jury.

Burden of proof. In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class.
(2) That the employer made an adverse decision concerning the plaintiff.
(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Dobson v. Eastern Associated Coal Corp., 188 W.Va. 17, 422 S.E.2d 494 (1992).

Sexual Harassment -- Duty of employers

The West Virginia Human Rights Act imposes on employers a duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment. Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1986). An employer with effective guidelines for prohibiting and dealing with sexual harassment is not liable unless the employer had knowledge of the misconduct or reason to know of the misconduct. Id. Knowledge of workplace misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the Act, would be aware of the conduct. Id.

The West Virginia Human Rights Act recognizes two types of sexual harassment. First, in quid pro quo harassment, an employer or its agent conditions an employee's job, employment benefits, or continued employment on his or her consent to participate in sex. Second, in hostile environment harassment, an employer discriminates against a female employee with respect to conditions or privileges of employment, when the workplace is infected, for example, by sexual barbs or innuendos, offensive touching, or dirty tricks aimed at the employee because of gender. Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1985).

In order to prove "quid pro quo" sexual harassment at the workplace, the complainant must prove:

1. That the complainant belongs to a protected class;
2. That the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions; and
3. That the complainant's reaction to the advance was expressly or impliedly linked by the employer of the employer's agent to tangible aspects of employment.

Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Relations Commission, 187 W.Va. 312, 418 S.E.2d 758 (1992),

Discrimination on the basis of disability. The Act defines "disability" to include:

(1) A mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking breathing, learning and working;

(2) A record of such impairment;

(3) Being regarded as having such an impairment.

Included within the scope of "disability" is a person with HIV or AIDS, Benjamin R. v. Orkin Exterminating Co., depression, Smith v. W.Va. Human Rights Commission, 2004 W.Va. LEXIS 123 (July 2, 2004), severe asthma, Alley v. Charleston Area Medical Center, Inc., 2004 W.Va. 69 (2004), and migraine headaches. Strawderman v. Creative Label Co., 203 W.Va. 428, 508 S.E.2d 365 (1998).

Unlawful discriminatory practices
The Act enumerates employment practices that are considered discriminatory unless based on a “bona fide occupational qualification,” including the following as set forth in § 5-11-9:

1. Discrimination with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is “able and competent” to perform the services required even if such individual is blind or disabled.

2. Prior to the employment, to elicit any information or make or keep a record of or use any form of application containing questions or entries concerning the race, religion, color, national origin, ancestry, sex or age of any applicant for employment.

3. To engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

“Able and competent” means that an employer has the right not to hire or to fire employees who are unable to perform a job because either they are generally unqualified or they have a handicap that impedes job performance, subject to the “reasonable accommodation” requirement. Ranger Fuel Corp. v. West Virginia Human Rights Commission, 180 W.Va. 260, 376 S.E.2d 154 (1988).

In order to determine if an individual is “able and competent,” the employer must consider if, with or without accommodations, (1) the individual is currently capable of performing the work, and (2) the individual can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees or the public. Id.

“Protected activity” includes opposition to a practice that the plaintiff reasonably and in good faith believes violated the provisions of the act. Therefore, even if there was no actionable sexual harassment, the plaintiff could still have been engaged in protected activity if she complained about being sexually harassed. Akers. V. Cabell Huntington Hospital, Inc., 215 W.Va. 346, 599 S.E.2d 769 (2004).

Discrimination for filing a workers’ compensation claim
West Virginia Code section 23-5A-3 provides that no employer shall discriminate against a present or former employee in his or her attempt to obtain workers compensation benefits. Powell v. Wyoming Cablevision, Inc. is a leading case in West Virginia which is directly on point and defines the three-prong prima facie test a Plaintiff must meet when alleging a violation of Section 23-5A-3 of the Workers Compensation Act in a civil case.

In order to make out a prima facie case of discrimination pursuant to the Powell standard, a Plaintiff must prove the following:

(1) An on-the-job injury occurred;
(2) Proceedings were instituted under the Workers Compensation Act; and
(3) The filing of a workers compensation claim was a significant factor in the employer’s decision to discharge or otherwise discriminate against the employee.

In analyzing the third prong of the Powell Test, i.e. whether the firing was retaliatory, the Powell Court noted that generally “courts have looked to a variety of factors including proximity in time of the claim and the firing, evidence of satisfactory work performance and supervisory evaluations before the accident, and any evidence of an actual pattern of harassing conduct for submitting the claim”. The Powell Court further noted that “[w]here the employer has a neutral absenteeism policy that permits discharge of an employee who is absent for a specific period of time, courts have generally held that termination of employment under such a policy does not violate a compensation antidiscrimination statute.”

Once an employee makes a prima facie showing of discrimination, the burden of proof shifts to the employer who must then show the termination was:

(1) legitimate
(2) non-pretextual
(3) non-retaliatory

Disparate Treatment Discrimination

The complainant will prevail in a disparate treatment employment discrimination case if the complainant shows by a preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is merely a pretext for a discriminatory motive. Holbrook v. Poole Assoc., 184 W.Va. 428, 400 S.E.2d 863 (1990).

Age Discrimination

For purposes of age discrimination, a person forty years of age or older is considered to be in a protected class.

Sexual Harassment -- Duty of employers

The West Virginia Human Rights Act imposes on employers a duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment. Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1986). An employer with effective guidelines for prohibiting and dealing with sexual harassment is not liable unless the employer had knowledge of the misconduct or reason to know of the misconduct. Id. Knowledge of workplace misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the Act, would be aware of the conduct. Id.

Discrimination on the basis of disability

The Act defines “disability” to include:

(1) A mental or physical impairment which substantially limits one or more of such person’s major life activities. The term “major life activities” includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking breathing, learning and working;

(2) A record of such impairment;

(3) Being regarded as having such an impairment.

Included within the scope of “disability” is a person with HIV or AIDS, Benjamin R. v. Orkin Exterminating Co., depression, Smith v. W.Va. Human Rights Commission, 2004 W.Va. LEXIS 123 (July 2, 2004), severe asthma, Alley v. Charleston Area Medical Center, Inc., 2004 W.Va. 69 (2004), and migraine headaches. Strawderman v. Creative Label Co., 203 W.Va. 428, 508 S.E.2d 365 (1998).

Reasonable Accommodation

Unlike the Americans with Disabilities Act, the West Virginia Human Rights Act does not include a specific provision on “reasonable accommodation.” Nevertheless, the Human Rights Commission and the West Virginia Supreme Court have inferred that the Act imposes the duty of “reasonable accommodation.” See 77 W.Va. C.S.R. 1, § 4.4 (1994); Morris Memorial Convalescent Nursing Home, Inc. v. West Va. Human Rights Commission, 189 W.Va. 314, 431 S.E.2d 353 (1993). The Commission defines “reasonable accommodation” to mean “reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he was hired.” 77 W.Va. C.S.R. 1, § 4.4 (1994). To comply with the West Virginia Human Rights Act, an employer must make reasonable accommodations for known impairments to permit an employee to perform the essential functions of the job. Morris Memorial, supra at 318, 431 S.E.2d at 357.

To state a claim for breach of the duty of reasonable accommodation, a plaintiff must prove the following elements:

1. The plaintiff is a qualified person with a disability.
2. The employer was aware of the plaintiff's disability.
3. The plaintiff required an accommodation in order to perform the essential functions of the job.
4. A reasonable accommodation existed that would meet the plaintiff's needs.
5. The employer knew or should have known of the plaintiff's needs and of the accommodation.
6. The employer failed to provide the accommodation.

Skaggs v. Elk Run Coal Company, Inc., 189 W.Va. 51, 479 S.E.2d 561 (1996).

The duty to accommodate does not require employers to retain employees who cannot fulfill the essential functions of the job. The law protects only "qualified" individuals with disabilities who, with or without accommodation, can perform the essential nature of the job. Ranger Fuel Corp., v. West Virginia Human Rights Commission, 180 W.Va. 260, 376 S.E.2d 154 (1988).

The West Virginia regulations state that "reasonable accommodations" include, but are not limited to: altering facilities; restructuring jobs, work schedules, and assignments; reassigning the employee to a vacant position for which the person is able and competent to perform; acquiring or modifying equipment to provide readers or interpreters; adjusting testing, training materials, or policies; and educating fellow workers. 77 W.Va. C.S.R. 1, § 4.5 (1994).

"Reasonable accommodation" included job modifications such as reassigning or transferring the handicapped employee to a part-time work schedule. Hurst v. St. Mary's Hospital, 867 F. Supp. 435 (S.D. W.Va. 1995). The Act does not necessarily require an employer to offer the precise accommodation an employee requests, at least as long as the employer offers some other accommodation that permits the employee to fully perform the job's essential functions. Skaggs v. Elk Run Coal Co., 198 W.Va. 51, 479 S.E.2d 561 (1996). If an employee who has requested reasonable accommodation cannot be accommodated in his or her current position, then the employer must inform the employee of potential job opportunities within the company and, if requested, consider transferring the employee to fill the open position. Id. A reasonable accommodation may include a temporary leave of absence that does not impose an undue hardship upon an employer, for the purpose of recovery from or improvement of the disabling condition that gives rise to an employee's temporary inability to perform the requirements of his or her job. Haynes v. Rhone-Poulenc, Inc., 206 W.Va. 18, 521 S.E.2d 331 (1999).

An employer may defend against a claim of reasonable accommodation by disputing any of the above elements or by proving that making such accommodation would impose an undue hardship on the employer. Undue hardship is an affirmative defense for which the employer bears the burden of persuasion. In determining whether an accommodation imposes an undue hardship, the trial court should consider the nature and cost of the accommodation, the financial resources of both the facility involved and the employer as a whole, and the type and characteristics of the employer's operation. See 77 W.Va. C.S.R. 1, § 4.6 (1994). A reasonable accommodation claim and the defense of undue hardship are necessarily determined on a case-by-case basis, but will normally depend upon a general analysis of costs and effectiveness. Essentially, the law mandates common sense courtesy and cooperation. "Accommodation" implies flexibility, and workplace rules, classifications, schedules, etc., must be made supple enough to meet that policy. "Undue hardship" implies a balancing, and the employer's interest in avoiding costs and disruption can furnish a defense only when they outweigh the policy gains. Skaggs, surpa.

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WISCONSIN

I. STATUTORY CHANGES

A. Grievance System after Act 10

In 2011, Wisconsin Act 10, known as "Wisconsin Budget Repair Bill," passed by legislature to address projected $3.6 billion budget deficit. Became effective June 29, 2011. Legislation primarily impacted collective bargaining, compensation, retirement, health insurance, and sick leave of public sector employees. Certain represented public employees exempt from changes to collective bargaining law.

Under the repair bill, state and local governments were prohibited from bargaining with their workers over anything besides a cost-of-living salary adjustment, including health benefits, pensions, workplace safety and other work rules.

On September 14, 2012, a Dane County circuit judge ruled a section of the budget repair bill unconstitutional as applied to city, county and school workers because the law violated the workers' constitutional rights to free speech, free association and equal representation under the law by capping union workers' raises but not their nonunion counterparts. Thus, the collective bargaining rights which were curtailed by Act 10 for county, city and school employees theoretically return to the status which existed prior to the passage of Act 10.

On September 18, 2012, the state appealed the decision and sought a stay of the decision from the circuit court. The circuit court denied the stay pending appeal. Presently, the record has been sent to the court of appeals. Two other challenges are currently pending against the constitutionality of the law.

B. Repeal of Compensatory and Punitive Damges in Cases under the WFEA

2009 Wisconsin Act 20, effective July 1, 2009, expanded Wisconsin's Fair Employment Law to make available compensatory and punitive damages for employment discrimination, unfair genetic testing, or unfair honesty testing in an employment setting. These damages were in addition to other remedies available under the Fair Employment Law. Due to these changes, Act 20 more closely aligned Wisconsin's Fair Employment Law with federal law, Title VII of the federal Civil Rights Act of 1964.

Less than three years later, on April 6, 2012, Governor Walker signed 2011 Senate Bill 202, eliminating compensatory and punitive damages for acts of employment discrimination or unfair honesty or genetic testing under the WFEA. The elimination of compensatory and punitive damages affected all cases in which a final decision had not already been mailed to the complainant on or after April 20, 2012.

Compensatory and puntive damages are still available in claims brought under federal employment discrimination laws.

C. Concealed Carry Law

As of November 2011, Wisconsin residents may apply for licenses allowing them to carry concealed handguns, knives (excluding swithblades), electronic weapons and billy clubs.

Under the Act, employers may impliment workplace policies prohibiting employees from carrying concealed weapons during the course of employment.

In addition, most private locations may prohibit concealed weapons on premises by posting signs at all entrances or probable access points. However, licensed individuals may not be prohibited from keeping concealed weapons in personal vehicles.

Additional key elements of the law include a prohibition of concealed weapons in certain places including police stations, state department of justice offices, jails, prisons, and other correctional facilities; courthouses; and areas beyond security checkpoints in airports.

The law also provides immunity to any person or employer who does not prohibit concealed carry on their property from liability arising from that decision.

Finally, the state department of justice will maintain a list of other states' concealed carry licenses that will be honored in Wisconsin.

D. Unemployment Insurance Law
Effective April 22, 2012, Wisconsin's Unemployment Insurance Law provides:

That a claimant is ineligible for (rather than forfeits) benefits if claimant conceals any material fact or wages earned;

For increase in amount of benefits for which claimant may be ineligible if conceals any material fact or wages earned;

That a claimant is subject to 15% penalty related to any benefits paid to claimant as a result of one or more acts of concealment;

That eligible claimant is ineligible for benefits during first partial/full week of unemployment (does not decrease benefits entitlement).

E. State Tax Credit for Hiring Disabled Veterans
Effective April 18, 2012, certain Wisconsin employers may claim a tax credit for hiring disabled veterans. For each full time hire, employer may claim $4,000 in the taxable year in which disabled veteran is hired and $2,000 in each subsequent taxable years.

For each part-time hire, employer may claim $2,000 in taxable year in which disabled veteran is hired and $1,000 in each of three subsequent taxable years.

Limitations include: no credit may be claimed in any taxable year in which disabled veteran voluntarily or involuntarily leaves employment; and employer may claim credit only for hiring disabled veteran who had received unemployment compensation benefits for at least one week before being hired; was receiving such benefits at time he or she was hired; and was eligible to receive such benefits at time benefits were paid.

II. COURT DECISIONS
A. Employment Discrimination and Issue Preclusion:

Aldrich v. LIRC, 2012 WI 53:
In employment discrimination case, two issues before the Court were: (1) whether Aldrich's complaint was deemed filed with the ERD on the date she filed documents with the EEOC that constituted a "charge" under the federal law, or deemed filed with the ERD on the date she filed documents with the EEOC that would have constituted a complaint under state law; and (2) was Aldrich barred by the doctrine of issue preclusion from litigation before the ERD the timeliness of her filing of the federal "charge" in the EEOC - - in other words, may she argue before the ERD that her intake questionnaire was a timely filing of a federal "charge" under federal law such that the ERD much consider it a complaint timely filed under state law?

Because of the many issues facing the Court regarding the first issue, it determined answer wasn't clear nor necessary at current stage of litigation. Considered only second issue and concluded, as a matter of public policy, complainants who diligently pursue employment discrimination claims should be given leeway in effort to preserve rights to have claims decided on their merits. On that basis, Court remanded case to LIRC with instruction for that body to remand the case to the ERD and the employer could no longer rely on issue preclusion to prevent Aldrich from re-litigating whether her questionnaire constituted a "charge" of discrimination.

B. Breach of Contract and First Amendment Claim:
DeBruin v. St. Patrick Congregation, 2012 WI 94:

Plaintiff filed complaint against St. Patrick, alleging employment terminated for improper reason. Circuit court dismissed complaint, concluding St. Patrick was religious institution and plaintiff was ministerial employee. Supreme Court affirmed, holding court may not review whether St. Patrick improperly terminated ministerial employee because its choice of who shall serve as ministerial employee is matter of church governance protected from state interference by 1st Amendment and Wis. Constitution, Art. I, 18; and accordingly, plaintiff's complaint failed to state a claim.

C. Wrongful Termination and Concurrent Jurisdiction:
Kroner v. Oneida Seven Generations Corp., 2012 WI 88:

John Kroner, CEO of Oneida Seven Generations Corporation, real estate company owned by Oneida Tribe, was terminated in 2008. Kroner, not a member of the tribe, sued for wrongful termination and breach of contract. On motion of Seven Generations, circuit court transferred case to tribal court under Wis. Stat. §801.54, giving circuit courts discretion to make transfer if concurrent jurisdiction exists and eleven-factor balancing test considered. However, §801.54 not adopted until July 2008 and had an effective date of 1/1/09. Kroner filed claims in 2008, before effective date. Appellate court upheld transfer, but Supreme Court ruled not proper to apply §801.54 retroactively and remanded case to require circuit court to proceed.

D. Unemployment Benefits and "Quit Without Good Cause":
Kierstead v. LIRC, 2012 WI App. 57 (April 2012)

LIRC ruled Kierstead voluntarily terminated (quit) position at Sterling Water when refusing to sign disciplinary warning notice acknowledging complaint filed against him and was told he would be fired if he didn't sign. Form didn't say signing would be admission of wrongdoing. Kierstead claimed he refused to sign because he didn't believe Sterling would fire him (thought manager was bluffing). Circuit court reversed LIRC, concluding Kierstead didn't voluntarily quit and entitled to unemployment benefits.
Appellate court reversed, concluding Kierstead not entitled to benefits. Appellate court clarified proper analysis when disciplinary forms and "voluntary termination" claims are at issue. Failing to sign employee disciplinary form not always a "quit without good cause." Situation requires good cause inquiry into whether employee knew signing would not be an admission, and court clarified law regarding what constitutes "good cause." Following inquiry, court ruled Kierstead's refusal was voluntary termination under Wis. Stat. §108.04(7)(a), even though he was fired, because he refused to sign disciplinary form knowing termination could result. Court also ruled Kierstead's refusal to sign not justified because he didn't indicate belief that signing was admission of wrongdoing alleged against him in warning notice.

E. Negligent Supervision and Damages:
Hansen v Texas Roadhouse, Inc. Case No. 2010AP3137 (WI Ct. App., Dec. 5, 2012):

Texas Roadhouse appealed judgment in favor of Hansen wherein jury awarded him punitive damages for injury suffered after discovering human hair intentionally placed in food by Texas Roadhouse employee. Texas Roadhouse contended trial court erred in upholding punitive damages award because jury did not find Texas Roadhouse causally negligent. Court of Appeals agreed. Hansen pled and jury considered and rejected liability based on negligent supervision. Liability on an underlying tort claim is necessary for an award of punitive and emotional distress compensatory damages. Appellate court, however, upheld trial court's grant of SJ on Hansen's negligent hiring claim and evidentiary rulings related to that claim.

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WYOMING

There were no significant statutory or regulatory developments in Wyoming in 2012. However, one case from the Wyoming Supreme Court was notable for its impact on Wyoming's presumption of "at-will" employment.

In *Kuhl v. Wells Fargo Bank, N.A.*, 2012 WY 85, 281 P.3d 716 (Wyo. 2012), Kuhl brought suit against his former employer, Wells Fargo Bank, N.A., alleging breach of an express contract, breach of an implied contract, promissory estoppel, and tortious breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Wells Fargo.

On appeal, Kuhl contended that he entered into an express contract with Wells Fargo that altered the presumption of at-will employment. Specifically, he argued that a letter from Wells Fargo offering him employment constituted an offer of an express contract that he accepted by beginning his employment. In affirming the district court's summary judgment, the Wyoming Supreme Court explained by way of background that when a contract is silent as to its duration and does not specify reasons for termination, the employment relationship is presumed to be at-will. Although the presumption of at-will employment may be altered by a showing that the parties entered into an express or implied contract prohibiting the employer from discharging the employee without just cause or for a set term, the court rejected Kuhl's arguments that the letter from Wells Fargo constituted an offer of an express contract. The letter did not specify the duration of Kuhl's employment, and language relating to eligibility for retention bonuses made clear that Kuhl might or might not remain employed. Moreover, the court noted that the letter contained language unequivocally expressing Wells Fargo's intent to offer Kuhl employment at-will. The court also rejected Kuhl's argument that an alleged representation by a human resources manager modified Kuhl's at-will employment status, finding that the letter at issue specified that the human resources manager did not have that authority.

The court also rejected Kuhl's argument that Wells Fargo's handbook created an implied contract. The Wyoming Supreme Court acknowledged that an employee handbook may supply the terms of an implied contract of employment if there is "a systematic discipline procedure or other language in an employee handbook implying termination may be for cause . . .." The court explained, however, that an employer may avoid formation of an implied contract by means of unambiguous language disclaiming the formation of a contract that is sufficiently conspicuous. Although the disclaimers in Wells Fargo's handbook were not in larger print or bold lettering (as is typically required), the disclaimers were conspicuous by virtue of repetition, prominence, and placement. Additionally, the court found that Wells Fargo expressly provided in the handbook that discipline was not "progressive," and that Kuhl had actual knowledge of the disclaimers, such that he could not reasonably claim that the handbook created an implied contract.

The court also affirmed summary judgment on Kuhl's other claims, including the claim for promissory estoppel. Of note, the court held that a valid disclaimer makes it unreasonable for an employee to rely on any subsequent understanding that his employment is anything other than at-will, thereby defeating Kuhl's claim for promissory estoppel.

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