

Ryan Swanson & Cleveland's 22nd Annual

Employment Law Update

September 29, 2010

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2010 Federal Law Update: What You Need to Know

Kristin Nealey Meier

Federal Employment Litigation Statistics

- EEOC Charges

Category	FY 2008	FY 2009	Percent Change
Total charges	95,402	93,277	-2.2%
Race	33,937	33,579	-1.05%
Retaliation	32,690	33,613	2.8%
Sex	28,372	28,028	-1.2%
Age	24,582	22,778	-7.3%
Disability	19,453	21,451	10.3%
National Origin	10,601	11,134	5.0%
Religion	3,273	3,386	3.5%
Equal Pay Act	954	942	1.3%

U.S. Supreme Court

- In disparate impact case, the use of an earlier unlawful employment practice states a claim
 - What this means to you: Employees have time to challenge your policy or test results after you implement them. Employers need to ensure that the policy or test does not have a disparate impact on any protected class before adopting it. Employees have more than a year to file a charge.

U.S. Supreme Court

- NLRB cannot act with only two members
 - What this means to you: This will likely not have an impact on employers unless you have a case pending in a Court of Appeals or the Supreme Court that the two-member NLRB panel decided. All of the cases pending on appeal are being reviewed by a three- or five-member NLRB panel. It is unclear what will happen with the other decided cases or their precedential value.

U.S. Supreme Court

- Search of employee police officer pager text messages was reasonable, so no 4th amendment violation
 - What this means to you: It is important to have a computer policy that specifically identifies what you as the employer have a right to do with the information in email, internet usage, etc. Your employee handbook should also spell out guidelines for computer usage and steps you as the employer may take with handheld devices, cell phones, etc.

U.S. Supreme Court

- Arbitrator, not court, decides whether arbitration agreement is unconscionable
 - What this means to you: It may be worth taking a second look at your arbitration agreements with employees to include a delegation provision to allow an arbitrator to decide the validity of the agreement.

U.S. Supreme Court

- Court, not arbitrator, decides CBA's ratification date; new cause of action for tortious interference rejected
 - What this means to you: An employer cannot file a tortious interference claim against an international union. And, consistent with the *Jackson* case above, it will be up to a court to decide whether the parties have agreed to arbitrate.

To Be Decided This Fall

- Whether an oral complaint is protected conduct under FLSA's anti-retaliation provision
- Preemption of Arizona statute that imposes sanctions on employers who hire unauthorized aliens
- Did NASA's background investigations violate federal contract employee's constitutional right to informational privacy?
- Does Title VII create a cause of action for third-party retaliation for persons who did not themselves engage in protect activity?

Ninth Circuit

- Wal-Mart National Class Action Certified
 - What it means to you: The significance of this case applies more to companies with a national presence, but concerns employers because it appears to allow a class certification even though the class is made up of several different levels of employees, some of whom had female supervisors who were also in the class.

Ninth Circuit

- A final decision-maker's wholly independent decision to terminate an employee can insulate an employer from liability for a supervisor's biased motive
 - What it means to you: It is obviously best to have supervisors that act without bias or retaliatory motives, educated through training. However, to the extent that an issue comes to light, it is vitally important to have an unbiased, neutral person conduct a thorough investigation into the matter.

Legislation and Regulation

- US Department of Labor clarifies the definition of “son or daughter” in FMLA
- SSA has no plans to resume sending out no-match letters

Thank you!

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22nd Annual Employment Law Update
September 29, 2010

2010 State Law Update:
What You Need to Know

Richard P. Lentini

Supreme Court Cases

Morgan v. Kingen

- Personal liability for an officer or agent of the employer who acts “willfully and with the intent to deprive the employee of any part of his wages” RCW 49.52.070.
- Inability to pay is not an excuse.
- A mini-casino filed bankruptcy under Chapter 11, reorganization. The business continued to operate, but the defendant operators and owners would not inject new capital.
- The bankruptcy converted to Chapter 7 liquidation, but not until unpaid wages of almost \$200,000 had accrued.
- The two owner/officers were held individually liable for the unpaid wages (perhaps double, plus interest and attorneys’ fees). Willfulness was established.

Supreme Court Cases

Briggs v. Nova Services

- Employers may not discriminate against employees for participating in “concerted activity.” RCW 49.32.020.
- Employees did not like the management style of the Executive Director and complained directly to the Board, in violation of company policy.
- Executive Director then fired the two complaining managers and another.
- Other employees protested, threatened and did “walk out” on their jobs until their demands were met.
- A split court: three justices found the employees who walked out were not terminated.
- “Concerted activity” applies to terms and conditions, not managerial philosophy.

Supreme Court Cases

Kitsap County Deputy Sheriff's Guild v. Kitsap County

- An employer may not discharge an employee if such action jeopardizes a clearly stated public policy.
- A deputy sheriff assigned to the child pornography task force became obsessive about the cases, and was reassigned.
- Ultimately he was discharged for 29 documented incidents. In arbitration, the arbitrator determined the county established the deputy had been untruthful, but ordered reinstatement.
- The majority of the Court adopted the “public policy” exception to enforcement of an arbitration award.
- The Court found no explicit, well defined policy for truthful police officers.
- The dissent would have found a public policy derived from “obvious ethical or moral standards,” and RCW 46.14 regarding service “only during good behavior.”

Court of Appeals Cases

Corey v. Pierce County

- A defamation claim deals with damage to reputation. The elements of proof are falsity; an unprivileged communication; fault (negligence or malice); and damages.
- A false light claim provides compensation for mental suffering, rather than reputation. Elements are false light highly offensive to reasonable person; and malice.
- Pierce county deputy prosecutor was promoted out of the bargaining unit, losing protection of discharge only for just cause.
- Plaintiff was fired for differences with the Prosecutor. In her desk was found money to be used as a donation for a colleague with an ill child. An investigation found no evidence of wrongdoing.

Court of Appeals Cases

Corey v. Pierce County (con't.)

- The prosecutor's office leaked to a newspaper an internal investigation on missing funds involving plaintiff. The Prosecutor made a statement to the effect plaintiff was untrustworthy. An article stated the Prosecutor stated plaintiff was under criminal investigation. Plaintiff thus became unemployable.
- Plaintiff was awarded over \$2,000,000 on various claims.
- Defamation and false light awards were affirmed.
- However, the Court of Appeals determined there is no cause of action in Washington for the negligent dissemination of harmful or confidential information.

Court of Appeals Cases

Collins v. Clark County Fire District 5

- Four women employed by the Fire District sued for gender discrimination and sexual harassment.
- Manager regularly spoke to and about women in demeaning and provocative ways. Board commissioners said "Well, that's just Marty."
- The jury returned a six-figure verdict, and the trial judge awarded substantial attorneys' fees. The Court of Appeals affirmed, finding sufficient evidence of discrimination and harassment and finding no basis for reducing the jury's award or the fee award.

Court of Appeals Cases

Smith v. Employment Security Department

- Smith, a public employee, feared retaliation from his employer for refusing to sign a declaration in opposition to another employee's sexual harassment claim.
- He began secretly recording coworker conversations.
- He was fired initially for violating his employer's directive to turn in his computer without deleting any files.
- The Court upheld the Commissioner's finding that Smith was disqualified from receiving unemployment benefits because of misconduct, including illegal acts.

Court of Appeals Cases

Roe v. Teletch Customer Care Management

- Plaintiff used marijuana prescribed by a doctor pursuant to the Medical Use of Marijuana Act. The employer had a policy prohibiting misuse of drugs or alcohol.
- Plaintiff tested positive for marijuana and was fired. She sued for wrongful termination.
- The Court of Appeals (Div. II) held that there is no civil cause of action for wrongful termination under the MUMA. Rather, the MUMA was enacted by the people (via initiative) to prevent the criminal prosecution of individuals using marijuana by prescription.

Thank you!

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22nd Annual Employment Law Update
September 29, 2010

Unraveling the Overlapping
Employee Leave Laws

James M. Shaker

Americans with Disabilities Act (ADA)

- 15 or more Employees
- ADA Definition of Disability: *A physical or mental impairment that substantially affects one or more major life activities*
- ADA Definition of Major Life Activity: *[i]ncludes “the operation of a major bodily function” which includes, among other functions and systems, the following: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.*
- ADA Definition of Qualified Individual with a disability: *A person who can perform the essential functions of the job with or without Reasonable Accommodation*
- Exception:
 - “undue hardship”
 - “direct threat to safety”

Washington Law Against Discrimination (WLAD)

- 8 or more Employees
- WLAD Definition of Disability:
 - a) “Disability” means the presence of a sensory, mental, or physical impairment that:
 - Is medically cognizable or diagnosable; or
 - Exists as a record or history; or
 - Is perceived to exist whether or not it exists in fact.
 - b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

Family Medical Leave Act (FMLA)/ Washington Family Leave Act (WFLA)

- 50 or more Employees
- Leave Period: 12 weeks
- Circumstances
 1. Employee's serious health condition (including pregnancy disability)
 2. Serious Health Condition of a Family Member
 3. Parental Leave
 4. "Qualifying Exigency" which relates to military leave. Active duty all up (FMLA only)
 5. Care for a family member or next of kin injured or ill as a result of active military leave (FMLA only – Note: 26 weeks a year)

Washington Family Care Act (WFCA)

- Eligible Employees may use paid time off to care for a sick family member:
 1. Children younger than 18 with health conditions that require treatment or supervisor,
 2. Adult children incapable of self care because of mental or physical disability, and
 3. Spouse, parent, parent-in-law, or grandparent who has a serious health center or an emergency condition.
- No minimum number of employees

Pregnancy Disability Leave (PDL)

- 8 or more Employees
- Protected leave for entire duration of incapacity due to pregnancy or childbirth

Washington Military Family Leave Act (WMFLA)

- Eligible Employees: those who work an average of 20 or more hours per week
- ALL Employees (no minors # of Employees)
- 15 days of unpaid leave per “military deployment of a spouse”
- 15 days run separately for WFLA but concurrently with FMLA “qualifying exigency” leave

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

Prohibits discrimination in:

- Hiring
- Retention
- Promotion
- Other benefits of employment

Domestic Violence Leave

- Eligible Employee: one who is a victim of domestic violence, sexual assault or stalking / or Employees who are family members of such victims.
- Purpose – to address legal financial and health care needs
- No minimum required hours worked

Thank you!

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**Resolving Conflicts Quickly:
Prevent Co\$tlly Turn-Over,
Litigation & Grievances**

Wallace Wilkins, Ph.D.

Wage and Hour Law: More Than Meets the Eye

Britenae M. Pierce

Wage and Hour Law

- Staying on the right side of wage and hour law requires more than just following the federal and state statutes and regulations
- There are rulings and interpretations of these statutes/regulations that affect you

Why You Need to Know More

- Secretary of Labor Hilda Solis has stated her intention to strictly enforce the Fair Labor Standards Act (FLSA)
- 2011 federal budget allows for 90 additional investigators and offers federal grants to states to increase enforcement, especially for misclassification of workers as independent contractors
- Increased penalties
- Proposed bills in Congress relate to employee misclassification, with accompanying increased penalties against employers for misclassification
- Wage and hour lawsuits are the most common type of lawsuit against employers

WHD Rulings and Interpretations

- U.S. Department of Labor's Wage and Hour Division (WHD) enforces the FLSA
- WHD issues rulings and interpretations, interpreting the FLSA and other statutes/regulations
- WHD websites:
 - General website: <http://www.dol.gov/WHD/>
 - Opinions and Interpretations: <http://www.dol.gov/whd/opinion/opinion.htm>
 - Fact sheets: <http://www.dol.gov/whd/fact-sheets-index.htm>

Administrator Opinion Letters

- Opinion letters offer fact specific guidance on the FLSA
- Given since FLSA enacted in 1938
- Helpful because they provide fact specific answers to employers
- In March 2010, the WHD decided to stop issuing administrative opinion letters
- Still useful to review previously issued opinions

Opinion Letter Example: Exempt Employee Leave Banks

- Multiple opinion letters from the last five years interpret exempt employee absences and whether those absences may be deducted from the employee's leave or paid time off bank
- For example, these opinion letters detail whether the employer may reduce the amount of leave in the bank for partial day absences (yes, but the employee must receive payment of his or her full salary)
- Also, the opinion letters state that if an employee has no accrued PTO leave (the bank is empty) and is absent for less than a full day, the employer still must pay the employee's full salary

Administrator Interpretations

- WHD now issues “Administrative Interpretations” instead of “Opinion Letters”
- These interpretations are supposed to offer general guidance on wage and hour issues applying to a broader range of employers than the fact-specific opinion letters
- Only a couple interpretations so far → employee friendly

Fact Sheets

- Provide general information to employers
- Can search for these by topic

Fact Sheet Example: Interns

- Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act
- Guides for-profit, private sector employers when determining whether their interns must be paid minimum wage and overtime under the FLSA
- Sets out six criteria for employers to use when determining whether the intern is entitled to minimum wage and overtime
- This fact sheet helps employers structure their internship programs to ensure they comply with wage and hour laws

What to Remember

- Law is changing all the time
- Increasingly strict interpretations of wage and hour law
- Litigation is growing
- Penalties are increasing
- Use the interpretive guidance available to guide and protect your company

Thank you!

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22nd Annual Employment Law Update
September 29, 2010

Social Networking in the
Workplace

Gulliver A. Swenson

What is social media?

Sites

- Facebook
- Twitter
- LinkedIn
- Foursquare
- Blogs

What is social media?

Generational differences

- Communication – the new email
- A way of life
- Accessibility – phone/home computer/work computer

Should you allow access to your employees during work time?

Business purposes?

- Marketing and communication

What is your work culture?

- How will policy impact employees?
- Will you lose employee confidence?
- How will you enforce it?

Should you allow access to your employees during work time?

- Employees need to understand reach of use – immediate, forever and worldwide, searchable
- Outside of work – does it impact work?
- Draft a policy
 - Set up a committee from various groups to set up a policy that makes sense for your company's culture
 - Communicate policy to employees
 - Training, if appropriate

Should you allow access to your employees during work time?

- Cross-referencing with other policies
 - Terminating employees for social networking activity
- Common sense!
- Have a source for people to ask questions

Using Social Networking as a Hiring Tool

- Useful, lawful information vs. risks of uncovering unwanted information
- Protected classes and potential discrimination claims – burden placed on employer to prove that they did not use it

Employee's Privacy Rights vs. Protecting Employer from Risk

- Are employees entitled to privacy from their employers accessing their social media pages?
- Federal Stored Communications Act
- Risks
 - Company reputation
 - Disclosure of private information
 - *Respondeat superior*
 - Harassment
 - Infringement

Horror Stories

- Sick day/Halloween party/Facebook
- Tweet about job offer
- Facebook Poke – violating order of protection

Thank you!

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September 29, 2010

The Road Ahead –
Anticipating Healthcare Reform
and Its Effect on Employers

Amanda C. Bley & Teru S. Olsen

Impact on Employees

- Flexibility
- Uniformity
- Regulation

Impact on Employees

Timeline for Implementation

- March 23, 2010: President Obama signed the bill into law
- September 23, 2010: Grandfathering plans had to be established and the decision by which plans were to be grandfathered in were made
- January of 2011: Most immediate changes
- January of 2013: Additional tax credits available for small businesses
- January of 2014: Most changes take effect

Impact on Employees

Impact will depend on Size

- Less than 10 employees: 33.6%
- 10-24 employees: 62.5%
- 25 to 99 employees: 81.6%
- 100 – 999 employees: 94.3%
- For the plan, division is at 50 and 200.

Terminology

Grandfathering

- Generally – Until 2014
- Benefit – Employee Flexibility
- Downside – Employer Flexibility
- Caution: 7 Ways to Lose Grandfathering

Terminology

Whistleblower, Retaliation & Penalties

- Discrimination and Retaliation
- Protection to Employees to Report Violations
- Regulation of Employer Size
- Pregnancy/Workplace Nursing

Terminology

Workplace Nursing

- Unpaid Breaks for Nursing Mothers
- Applies to First Year after Childbirth
- Privacy Required – Hardship?

Immediate Changes

Tax Credits for Small Employers

- Less than 50 full time employees
- For 10 or fewer employees – up to 35% credit
- Credits for phasing out high wage employees
- Spouses and Dependents?

Immediate Changes

Cafeteria Plans

- Safe Harbor Non-discrimination Rules
- Requires Employee Contribution
- Flexible Spending Account

Immediate Changes

Flexible Spending Plans

- May Survive – May Not
- Prescription Drug Coverage Will
- Over the Counter Will Not – Except Insulin
- Talk to your Insurance Broker
- Talk to your Employees

Immediate Changes

Retirement Plans

- Retirees over 55 not eligible for Medicare
- Claims between \$15,000 and \$90,000
- Effective through 2014
- Allocation of \$5 billion

Immediate Changes

W2 Requirements

- Terminated employee rights
- Reflection of health insurance premiums paid for each employee AND
- Reflection of employee share of premiums

Future Changes – Brief Recap

- 2011
- 2013
- 2014

Future Changes – Brief Recap

More Regulations

- www.healthcare.gov
- kff.org
- Department of Health (DHHS) updates

Concerns for Today – Employee Communications

- Grandfathering Status
- 26-Age Dependent Notice
- FSA Program – Over the Counter Medications
- Preventative Coverage
- Resource: Department of Labor Website

Unanswered Questions

- Immediate Effects?
- Effect on Costs?
- Increased Paperwork?

Recommendations

- Talk to your Insurance broker (ALL of you)
- Talk to your employees
- Healthcare.gov
- Don't depend on the media
- www.ryanswansonlaw.com



Thank you!

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