2024 Barrett McNagny Human Resources Seminar

February 15, 2024

You can submit questions at www.barrettlaw.com/conference.

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Indiana Workers Compensation

Presented by:

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James O’Connor has experience in representing businesses, insurers, and individuals through the legal system in matters involving jury trials, employment disputes, cybersecurity, contract disputes, insurance litigation, insurance coverage analysis, workers compensation, employment litigation, HR investigations, and data breach response.

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Disclaimer

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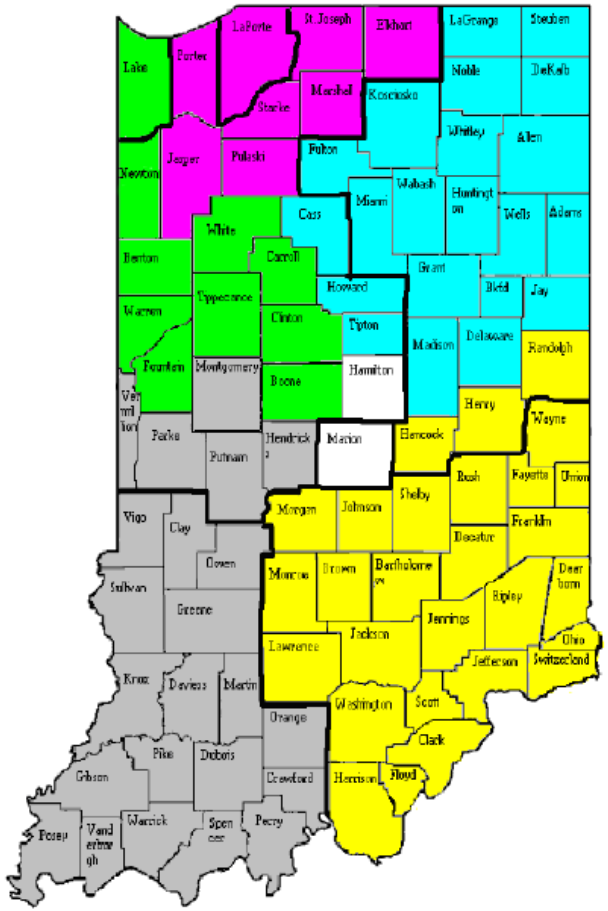
Workers Compensation: What is it?

- Statutorily created administrative agency that administers claims related to work related injuries.
- Prior to enactment, employee filed a negligence claim against the employer for injuries sustained on the job.
  - Employer could use contributory negligence as an affirmative defense.
  - Estimated 80% of negligence cases failed.
  - Impact from failed employee claims: unpaid medical bills? No wages? Reliance on public aid?
  - Impact from "successful" employee claims: high legal costs to employers? time to get through system? Ability of employer to pay very high judgment?

Indiana's Work Comp System

- Contrast in styles: Indiana's "private insurance" system vs. Ohio's "monopolistic" system.
- Most Indiana employers buy WC insurance coverage through insurers.
  - Limited number of Indiana employers are "self insured"
  - Majority of U.S. States operate a "private insurance" system
  - WC's Administrative Law system has "exclusive jurisdiction" over WC claims
  - Compliance Director
- Ohio is one of 4 "monopolistic" states
  - Wyoming, Washington and North Dakota
  - State gov't agency charges a tax that equates to a form of premium
  - State's Attorney General's office represents employers in WC filed in county courts

Indiana's WC Hearing Districts – who and where



The WC "Board" has

6 "Hearing Officers" & 1 Chair:

1) Sandrea O'Brien
2) A. James Sarkisian
3) Daniel Foote
4) Diane Parsons
5) Douglas Meagher
6) Kyle Samons

Chair: Linda Hamilton

Indiana Work Comp's "Exclusive Jurisdiction"

- The Board has Exclusive Jurisdiction to hear claims:
    1. Involving personal injury or death
    2. "Arising out of" and "in the course of" employment
    3. Occupation Disease Act included
- Strict liability system – only question is it "compensable?"
- Benefits for Injury claim:
    1. medical treatment
    2. Compensation for lost wages (TTD, TPD, PTD)
    3. Compensation for loss of use of a body part (PPI)

Traveling Workers: which state law applies for injuries occurring outside Indiana?

- Common rule: Is there a contract for the employment in the state?
- Alternative applications of state law:
  - Employee's state of residence
  - Any state in which the employee performs work
  - The state in which the employer insured its workers compensation liability
- Employee may file in any state where there might be coverage
- No double recovery (BI claims)

Employment Relationships
Required Coverage (no minimum # of employees)

- All public and private employer-employee relationships
- Executive Officers
- Employees outside the State of Indiana or outside the United States
- Boxing, wrestling or other ring exhibitions (MMA)
- Part time employees
- Minors; On the Job Training under federal school laws (trade schools)
- Volunteer Firefighters/EMTs

Employment Relationships Not Covered

- Railroad Employees
- Employees in Federal Commerce (ex. Jones Act/Longshoreman Act)
- Real Estate Professionals
  - Must be licensed real estate agents
  - Substantially all remuneration directly related to sales volume, not hours
  - Written agreements with real estate brokers that they are not employees for tax purposes
- Independent Contractors
  - Same analysis as IRS uses for determination
- Athletes on Scholarship
- Inmates of Penal Institutions
- Volunteers
  - Provided no form of compensation is received
- Coaches hired by nonprofit corporations

Employment Relationships
Optional Coverage by the Employer

- Employer must file an Election of Coverage Form
- Local police officers and firefighters
- Reserve police officers
- Volunteers working for hazardous materials response team
- Executive Officers of Public or Non Profit Corporations
- Sole proprietors
- Partner in a partnership
- Owner operators
- Members or managers of a LLC

Other Employment paradigms

- Temporary & Leased Employees
  - Temp agencies must maintain work comp coverage even if the workers are under the supervision of other employers
- Employee Lending
  - “Lent” employees are covered by their “regular” employer’s coverage
  - The “borrowing” employer should have wc coverage and the employee can inquire about both employers having coverage
- Joint Employment
  - Employee has two employers and works under simultaneous control of both
  - Both employers may bear liability in proportion to the wages each pays the employee

WC Insurance Requirement & other notes

- Employers must file proof of insurance with the WC Board
- Self insured employers pay for WC benefits from their own funds; they must be authorized by the Board to obtain self insured status
- Employers may not deduct WC premiums from payroll
- Employers may not ask employees to waive wc rights
- Notice of WC Coverage must be posted "in a conspicuous location"
  - Include name, address, telephone number of the carrier or administrator
  - Penalties of $50 for violations
- Penalties to Employer for failing to carry insurance:
  - Medical expenses
  - Double compensation
  - Reasonable atty fees
- Board may file legal action against employer failing to carry wc insurance
  - Board can issue order for employer to cease doing business until proof of insurance is filed
  - Board may require a deposit security, indemnity or bond to cover periods of insurance lapse
- Employers who fail to carry insurance commit a Class A infraction

Elements of Compensability

- Elements that employee must prove at hearing:
  1. Personal injury or death
  2. By accident
     - "unexpected" injury – occurs from either an unexpected event or unexpected result
  3. Arising out of the employment
     - Causal relationship between the injury and the employee's services
     - If a reasonably prudent person considers an injury incidental to employment
  4. In the course of employment
     - Accident causing injury occurred at a time and a place at which the employee would reasonably be expected to be in connection with this job

Examples of Compensable claims

- Injuries intentionally caused by managers, supervisors or foremen
  - Note these are co-workers, not the "employer"
- Repetitive Trauma – carpal tunnel syndrome
- Co-employee assaults – aggressor's injuries not covered; innocent victim's injuries are covered
- Horseplay – covered if innocent victim or if employer acquiesces
- Personal needs – incidental to employment
- Parking lot injuries – for lots owned by employer
- Ingress/egress
- Heart attack cases – if employment triggered the heart attack
- Hernia cases – if medically shown that work caused the hernia or materially accelerated it
- Heat stroke/prostration/sunstroke – if employee put at greater risk for such injury than the general public
- Psychological injuries – assuming the stimulus or stress arises out of and in the course of employment
- Lightning/natural phenomena – if risk of injury is greater than other person not so employed
- On call employees summoned to work are "in the course of employment"
  - Deviation from route – personal detour means no longer in course of employment
- Lunch period – injuries covered if employee is on employer premises and with employers consent; off campus lunch not covered
- Recreational Activities/Employer sponsored parties – if attendance is encouraged or mandatory
- Traveling employees – covered while traveling

Defenses to WC claims

- WC is supposed to be a “no fault” system; but, several “affirmative defenses” exist if injury or death is:
  - Due to employee’s knowingly self-inflicted injury
  - Due to intoxication
  - Due to commission of an offense (not traffic related)
  - Due to a knowing failure to use a safety device or appliance
  - Due to a knowing failure to obey a reasonable written safety rule
    - Posted in a conspicuous position in the workplace
  - Due to a knowing failure to perform any statutory duty
- Employer has the burden to prove the defense

Forms and Reports

- First Report of Injury (FROI) must be filed with Board if injury or death results in employee's absence from work for more than 1 day
- FROI must be filed with WC insurer within 7 days of the injury/death or within 7 days of employer's knowledge of injury/death
- WC insurer must file with Board not later than 7 days after FROI received or 14 days after employer's knowledge of injury (whichever is later)
- Employee that is injured but misses no time is not required to file FROI; but, if EE later misses 1 day of work because of injury, Report must be filed
- Filing FROI does not mean the injury is compensable
- Notice of Denial must be issued to employee and Board sooner than 29 days after employer's knowledge of injury
- If Notice of Denial issued, a 38911 (Report of Claim Status/Request for IME) should be mailed to employee and identified as being "non-compensable"

Medical Benefits

- Employers must reimburse employees for lost work due to medical treatments or travel to of from the place of treatment based on their daily average wage. (Full wages, not 2/3 AWW)
- Employer “directs medical care” by selecting the treating physician
- If employer fails to provide medical treatment, then employee may go to any physician
- Once employer directs medical treatment, insurance carrier cannot later refuse to pay for the treatment
- Employee has the right to get self directed treatment or opinions at the employee’s expense
- Medical treatment and benefits are provided until the employee reaches Maximum Medical Improvement (MMI).
- Future medical treatment may be ordered by the Board where employee sustains permanent injuries
- Palliative treatment may be ordered to reduce pain accompanying permanent injury.

Other medical treatment concerns

- Rehab nurses – may be used to coordinate treatment. Only the physician can ask the rehab nurse to leave the exam room, and the NCM must immediately comply
- Employee has the right to medical records related to the WC treatment; but, employee must pay the "reasonable charge" associated with the request for the records
- Examination Reports are the form of evidence preferred at hearings
- Treatment requiring travel outside the county of employment means that employer must pay reasonable expenses for travel, food and lodging necessary during the travel. Reimbursement is at the same level that Indiana reimburses its employees for travel. May be paid in advance to employee.
  - Meal allowance is available if employee is traveling for more than 12 hours (between $12 & $24 depending on timing of travel)
- For employees without transportation, employer must provide reasonable sums sufficient to defray the expenses by the "most convenient means."

Reimbursement of Medical Services

- Assuming the Employer (through its insurer) has not separately negotiated with a medical service facility, Employer's pecuniary liability is set at 200% of the amount payable under Medicare
- Reimbursement to a medical service provider for an implant may not exceed the invoice amount plus 25%

Compensation for "Disability"

- "Disability" means an inability to work
- Temporary Total Disability (TTD)
  - Paid for time an employee is completely unable to perform regular work due to injury
  - Paid at 2/3 the pre-injury Average Weekly Wage (AWW)
  - Max period of 500 weeks
- Temporary Partial Disability (TPD)
  - Paid for period that employee is partially unable to work
    - Ex: limited hours or temporary assignment to lesser paying job
  - Paid at 2/3 of the difference between pre-injury and post-injury AWW
  - Max period of 300 weeks
- Permanent Total Disability (PTD)
  - Paid when employee will never again be able to work in reasonable employment
  - Paid out at 500 weeks of TTD rate
  - If due, may be paid in lump sum amount upon agreement of parties

Timing of benefits

- No TTD for first 7 days
- Compensation paid starting on 8th day
- If employee still not working 22 days post injury, employee receives compensation for first 7 days
- First weekly installment of compensation is due 14th day after disability started
- 1043 Agreement to Compensation sets the TTD rate; due to employee within 15 days of the first installment being due
- Benefits are paid in weekly installments
- Disability benefits are not taxable

PPI

- Permanent Partial Impairment (PPI) means partial or total loss of body part or functionality of body part.
- PPI is paid out under a statutory schedule.
- PPI is due only after a determination that employee is at MMI
  - MMI also called “quiescence”
  - Injury has healed to the fullest extent possible and no further treatment would improve employee’s condition
- Upon assignment of PPI rating, employee sent a 1043 Agreement to Compensation stating degree of impairment and explaining PPI calculation
- A Permanent Total Disability finding (PTD) equates to a payment of 500 weeks of TTD or the PPI rating (whichever is greater)
- PPI compensation, like TTD, is not taxable

PPI formulas

- Impairment rating assessed by a physician is converted to a dollar award through the use of the "degree system"
- Statutorily approved conversion system: for injuries on or after July 1, 2023, following system:

On or after:	Degrees 1-10	11-35	36-50	51-100
July 1, 2023	$1803	$2011	$3282	$4182
July 1, 2024	$1857	$2071	$3380	$4307
July 1, 2025	$1913	$2133	$3481	$4436
July 1, 2026	$1970	$2197	$3585	$4569

- Entire body is worth 100 degrees. Lower degree values assigned to individual body parts. Ex. Thumb is worth 12 degrees.
- Amputations pay at double the dollars per degree
- Ex: Assume date of injury after 7/1/23; 25% impairment to the whole body (100 degrees)
  - 25% x 100 degrees = 25 degrees
  - 25 degrees = $18,030 (degrees 1-10 at $1803/deg) + $30,165 (degrees 11-25 at $2011/deg) = $48,195
- Ex. Assume date of injury after 7/1/26; 50% impairment to the thumb (12 degrees)
  - 50% x 12 degrees = 6 degrees
  - 6 degrees (6 x $1970) = $11,820

Degree Schedule

- Back injuries are rated as whole body
- Loss of arm/hand below the elbow – 40 degrees
- Loss of arm above the elbow – 50 degrees
- Foot/leg below the knee – 35 degrees
- Entire leg / above the knee – 45 degrees
- Loss of testicle 1 / 2 – 10 degrees / 30 degrees
- Loss of both hands, both fees, sight in both eyes – 100 degrees or PTD
- Loss of use or loss of 2 or more phalanges of:
  - Thumb – 12 deg; Index – 8 deg; second – 7 deg; third – 6 deg; fourth – 4 deg
- Loss of use or loss of 1 or more phalange of:
  - Big toe – 12 deg; second – 6 deg; third – 4 deg; fourth – 3 deg; fifth - 2 deg
- Permanent loss of vision – 35 degrees
- Complete loss of hearing in one ear – 15 degrees; both ears – 40 degrees

Max TTD and Compensation Rates

- DOI on or after July 1, 2023 – Max AWW: $1205; TTD: $804
  - Assuming 40 hours / week, no OT: $1205 = $30.125/hr
- DOI on or after July 1, 2024 – Max AWW: $1241; TTD: $828
- DOI on or after July 1, 2025 – Max AWW: $1278; TTD: $852
- DOI on or after July 1, 2026 – Max AWW: $1316; TTD: $878

- Max Comp for DOI on or after 7/1/2023: $402,000
- Max Comp for DOI on or after 7/1/2024: $414,000
- Max Comp for DOI on or after 7/1/2025: $426,000
- Max Comp for DOI on or after 7/1/2026: $439,000

Termination of TTD benefits

State Form 38911

- Once started, TTD benefits can only be stopped:
  - Employee returns to any employment or been released by treating Dr. to RTW
  - Employee refuses to undergo medical examination under 22-3-3-6
  - Employee refuses to accept suitable employment under 22-3-3-11
  - Employee's Death
  - Employee has received 500 weeks of TTD or max comp under 22-3-3-22
  - Employee is unable or unavailable to work for reasons unrelated to the compensable injury
  - Employee has changed jurisdiction to state other than Indiana
  - State Form 54217 – Notice of Suspension
- Dispute Form requests IME

Terminating Employment

- Employee who is out of work while on WC leave may have employment terminated for reasons unrelated to the WC injury
- Ex: work slow down causes layoffs starting with most recent hires. After laying off several EEs, the next EE on the hire list is out on WC. This EE is laid off because he is next on the list. There is no retaliation for work comp filing because lay off was not related to EE's WC status.
- EE separated from employment while on WC is still entitled to receive medical treatment until MMI.
- There is some question about whether an employee separated from employment will be entitled to TTD. Had no workplace injury occurred, the employee would have been separated from employment. So, why should the employer continue wage loss replacement benefits if the employee would not be entitled to wages?
- An employee's resignation is treated the same as a termination for WC purposes.

WC Dispute Resolution

- Mediation services offered by WCB. Flat rate of $350 for up to 5 hours and $50/hr thereafter. No travel expenses.
  - Current or former long term employees at Board
- Employees requiring assistance complete a Request for Assistance form.
- The Board may appoint a doctor to perform an Independent Medical Examination (IME). Employer is usually ordered to pay for the IME.
- Compromise Agreements settle disputes about compensability or any other issues relevant to the dispute. Board must approve the settlement agreement.

WC Formal Resolution

- Employee files an Application for Adjustment of Claim
- Board opens a Cause Number and notifies Employer and sets hearing date
- Hearings are set in the count where the injury occurred
- An Application for Adjustment of Claim / Change in condition must be filed within 2 years from the Date of Injury or date that last compensation was received.
- Should either party wish to appeal a Hearing Officer's decision, the Application for Review by the Full Board must be filed within 30 days of the single Hearing Officer's decision
- The Full Board meets in Indianapolis 7 times per year
- The Full Board re-hears the evidence presented to the Hearing Officer; typically no new evidence is introduced
- A party wishing to appeal the Full Board's "Final Order" must file with the Indiana Court of Appeals within 30 days

Employee attorney fee schedule

- Minimum of $200
- 20% of the first $50,000
- 15% of recovery in excess of $50,000
- 10% of unpaid medical, out-of-pocket medical expenses, future medical expenses
- Atty Fees subject to approval of WC Board

Second Injury Fund

- Designed to prevent discrimination in hiring workers who have lost the use of an arm, hand, leg or foot.
- Under this paradigm, the employer is liable only to the extent of compensation due for the second injury.
- Also, in the case of PTD, upon exhaustion of maximum compensation payable under the WC Act, the employee may apply to this Fund for benefits.
- TTD paid in intervals of 150 weeks

Death Benefits

- Upon passing of Employee, Employee's dependents become eligible to receive death benefits and funeral expenses (up to $10,000 – as of 2022)
- Dependents are entitled to weekly payments (TTD) up to 500 weeks
- Dependent spouse's dependency is terminated upon remarriage
  - Spouse receives a lump sum settlement of 104 weeks of compensation (or remainder left unpaid whichever is less)
- Three types of Dependents
  - **Presumptive Dependents**: spouse living w/ EE at time of death; unmarried child under 21 living w/ parents at time of death or not living with parents but with an order for support; child over 21, not married and has a physical or mental incapacity prohibiting earning income; child over 21, not married and keeping house for parents.
  - **Total & Partial Dependents in Fact**: relatives of the deceased by blood or marriage who are totally or partially dependent for support on deceased employee.
- Payments go to Presumptive Dependents to exclusion of Dependents in Fact
- More than one Presumptive Dependent gets split equally

Miscellaneous Issues

- Child Support Orders are enforceable against TTD
  - Max withholding is half (1/2) of compensation award
- WC Act does not require EEs continue to accrue vacation, personal, or sick days while on total or partial disability
  - Employer may not require EE to use these benefits in lieu of TTD
  - Cannot reduce AWW with vacation, personal or sick days
- WC Act does not require employer to continue to pay employee benefit plans (e.g. health insurance) while employee is not working
  - If fringe benefits are discontinued, the Employer may be required to take into account amounts paid for employee benefits in calculating AWW
- No claims for compensation are assignable; Compensation under WC is exempt from creditor claims (except child support order)
- Failure of Employer to pay on claim results in WC Order becoming enforceable in civil court in county where injury occurred
- Should Employer's insurance carrier become insolvent, Indiana Guaranty Association will cover amounts

Vocational Rehabilitation & Reemployment

- Injured workers unable to return to their pre-injury job may qualify for Vocational Rehabilitation
  - Employer does not pay for Voc Rehab
- The WC Act does not contain a provision requiring the Employer to keep the Employee at pre-injury job status
- Employment may not be terminated on the basis that Employee filed a WC claim. Indiana recognizes that wrongful discharge or retaliatory discharge is one exception to the Employment at Will doctrine.

Legislative Updates

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Biden Administration

- **At a June 17 political rally organized by Unions to announce reelection campaign, President Biden said he was proud to be "reelected the most pro-union president in history."**
- **There has been impact with the NLRB and organized labor**
  - February 4, 2021 – PRO Act reintroduced
  - March 9, 2021 – Passed House
  - March 11, 2021 – Received in Senate
  - April 26, 2021 – Task Force on Worker Organizing and Empowerment to "increase union density"
  - February 7, 2022 – Task Force's initial report with 70 recommendations
- **First modern president to visit a picket line**
- **Continued encouragement of unionization and collective bargaining**

National Labor Relations Board (NLRB)

- **Jennifer Abruzzo, General Counsel**
  - **Memorandum GC 21-04 (August 12, 2021)**
    - Targeted 53 issues for change, including employer handbook rules, confidentiality provisions and instructions, what constitutes protected activity, employer duty to recognize and/or bargain
  - **Memorandum GC 22-02 (February 1, 2022)**
    - Section 10(j) of NLRA
    - NLRB authorized to seek injunctions where workers have been subject to threats or other coercive conduct during an organizing campaign where normal pace of Board processes would be inadequate to protect employer rights
    - "[S]eek prompt Section 10(j) relief [. . .] where the facts demonstrate that employer threats or other coercion may lead to irreparable harm to employees' Section 7 rights."
  - **Memorandum GC 23-08 (May 30, 2023)**
    - GC's take on non-competes
    - Could be reasonably construed to deny employees the ability to quit or change jobs
    - Chills certain types of Section 7 activity

NLRB's Joint Employer Standard

- **"Joint Employer" redefined under NLRA**
  - **Issued October 26, 2023**
  - **Replaced 2020 standard**
  - **Departure from "substantial and immediate control"**
  - **"Essential terms and conditions of employment" include:**

    1) wages, benefits, and other compensation;

    2) hours of work and scheduling;

    3) the assignment of duties to be performed;

    4) the supervision of the performance of duties;

    5) work rules and directions governing the manner, means, and methods of performance of duties and the grounds for discipline;

    6) the tenure of employment, including hiring and discharge; and

    7) working conditions related to the safety and health of employees.
  - **Focus is on right to control, not control itself**
  - **Applies to cases after effective date, February 26, 2024**

NLRB Changes to Union Organizing Process

- **Previously, if Union wanted to represent employer's workers it could: 1) demand to be recognized as the representative for bargaining; or 2) petition the Board to represent employees by way of election**
- ***Cemex Construction* case (NLRB decision of Aug. 25, 2023) created more lenient standard to determine when employers are required to bargain with union without a representation election**
- **Now, option 1, once futile, has a significant outcome. When Union requests voluntary recognition, employer must either:**
  - **Recognize union and bargain**
  - **Promptly file a petition for election**

FLSA FINAL Rule on Employee Classification – Departure from 2 Part Test

- **Previously a 2 part test:**
  - **1) Nature and degree of control over the work; and**
  - **2) Opportunity for profit or loss as a result of personal investment**
- **If both factors indicate the status as IC, analysis ends**
- **If the status is not clear, other factors may be weighed**
  - **Amount of skill required for position**
  - **Performance of the working relationship**
  - **How integrated the worker's role is to the organization's overall operation**
- **Previous analysis: Is the worker more like a small business operator rather than an employee?**

FLSA FINAL Rule on Employee Classification

- **Effective March 11, 2024**
- **Rescinds IC status under FLSA 2021 Rule (published Jan. 2021)**
- **Returns to "totality of the circumstances" standard but more pro-employee**
- **6 Factor Test w/ additional factors that are relevant to question of economic dependence (no one factor presumed to carry more weight than another)**
  1) Opportunity for profit or loss depending on managerial skill
  2) Investments by the worker and employer
  3) Degree of permanence of the work relationship
  4) Nature and degree of control over performance of the work and working relationship
  5) Extent to which the work performed is integral part of the employer's business
  5) Skill and initiative of the worker
- **Not controlling but likely cited as persuasive authority for federal courts considering issue**

The Pregnant Workers Fairness Act

- **Effective June 27, 2023**
- **Applies to employers with 15 or more employees; governs accommodations only**
- **Employers must provide temporary and reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an "undue hardship."**
- **"Reasonable accommodation" varies depending on the circumstances including the employee's job, the nature of the employer's business, the impact upon co-workers, and the employer's resources.**
- **Employers must not:**
  - Require an employee to accept an accommodation without a discussion about the accommodation between the employee and employer;
  - Deny a job or other employment opportunity to a qualified employee or applicant based on the person's need for a reasonable accommodation;
  - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
  - Retaliate against an individual for reporting or opposing unlawful discrimination or interfere with an individuals' rights under the PWFA.

DOL Proposed Rule on Salary Threshold

- **August 30, 2023 DOL announced Notice of Proposed Rulemaking proposing increase to Exempt Salary Thresholds**
  - Executive
  - Administrative
  - Professional
  - Highly compensated
- **Exemptions – Employers required to pay employees OT for hours worked over 40 hours a week unless exception applies**
- **Employees must perform certain duties and be paid on a salary basis that meets certain statutory minimums**
- **Current threshold for these exemptions is $684 per week ($35,568 per year).**
- **Proposal:**
  - Increase $684 to $1,059 weekly
  - Increase salary threshold from $107,432 to $143,988 annually for highly compensated employees
  - Automatic updates to the salary thresholds for the executive, administrative and professional exemptions every three years

Occupational Safety and Health Administration (OSHA) Reporting

- **Effective January 1, 2024**
- **OSHA Forms 300 and 301 - certain employers must submit injury and illness information to OHSA electronically**
- **“High Hazard” industries w/100+ employees**
  - Farming operations
  - Textile manufacturers
  - Construction material manufacturers
  - Motor vehicle manufacturers
  - Food and beverage wholesalers
  - Trucking and transportation operators
  - Medical care facilities
  - Sports and entertainment companies
- **Use legal company name on all electronic submissions to OSHA re injuries**

OSHA Proposed Rule

- **Proposed to amend 29 CFR §1903.8**
- **Notice of Proposed Rule Making – "Worker Walkaround Representative Designation Process"**
- **Proposes clarification as to the third party representative authorized by an employee to accompany the OSHA Compliance and Safety Officer during a workplace inspection**
- **Seeks to increase employee participation during walkaround inspections**
- **Could permit union representatives to participate in walkaround inspections even if the worksite is not unionized and the representative is not an employee of the employer**

EEOC Proposed Enforcement Guidance

- **October 2, 2023 - Proposed Enforcement Guidance on Harassment in the Workplace**
- **If issued in final would be first update to workplace harassment guidance since 1999**
- **Addresses various updates in the law, conduct in virtual environments (*e.g.* private phones, social media)**
- **Discusses:**
  - Covered bases and causation
  - Discrimination regarding a term, condition, privilege of employment
  - Basis for liability for employer
- **Even if final, will not have force of law but will provide clarity regarding requirements/standards under EEOC policies**

FTC Proposed Ban on Non-Competes

- **January 5, 2023 – FTC issued a proposed rule which would ban non-compete clauses from employment contracts for employees and independent contractors. Vote set for April 2024.**
- **If issued in final, the rule would require all employers who have entered into contracts with employees or independent contractors that include a non-compete clause to rescind the non-compete clause by the compliance date.**
- **Employers will be required to issue individualized notices to each employee or contractor that the non-compete clause is no longer in effect and may not be enforced against employee/contractor.**
- **Rule would not generally apply to non-disclosure agreements ("NDAs") or client or customer non-solicitation agreements because these covenants do not prevent a worker from seeking or accepting employment with a person or operating business after separation of employment. However, recall NLRB has issued position on this.**
- **FTC outlines a functional test for determining whether a contractual term is a de facto non-compete clause.**

Cannabis Use - Ohio

- **December 2023 – Ohio is the 24th State where recreational marijuana is legal**
  - 21 years of age and older may buy and possess 2.5 ounces of cannabis (and grow certain number of plants)
- **Employers may test for marijuana**
- **Update written policies accordingly to maintain control over workplace drug practices and procedures**
- **Employee termination for violation of workplace drug policy is considered just cause (defensible claim)**

2024 Wage Increases

- **22 States put higher wages into effect as of January 2024**
- **Indiana Neighbors:**
  - Illinois increased from $13/hour to $14/hour
  - Michigan increased from $10.10/hour to $10.33/hour
  - Ohio increased from $10.10/hour to $10.45/hour

Paid Leave for Two Neighboring States

- **Two neighboring states have paid leave laws effective January 2024**
- **Illinois**
  - Chicago Paid Leave and Paid Sick and Safe Leave Ordinance
    - Requires employers to provide 40 hours of paid sick leave and an additional 40 hours of paid leave per year to be used for any purpose (no documentation required)
  - Illinois Paid Leave for All Workers Act
    - If not already in a municipality w/pre-existing paid sick leave or paid leave, requires employers to provide up to 40 hours of paid leave that can be taken for any reason (no documentation required)
  - Bereavement Leave for violent crimes, sexual violence, loss of child to violent crime
- **Minnesota**
  - Minnesota Earned Sick and Safe Time ("ESST")
  - ESST can be used for the mental or physical illness, treatment, preventative care, which includes treatment for incidents of domestic abuse, sexual assault, of the employee or employee's family member
  - Accrue at least 1 hour of ESST for every 30 hours worked, up to 48 hours per year

2023

CASE DEVELOPMENTS IN EQUAL EMPLOYMENT OPPORTUNITY LAW

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Disclaimer

- The information and procedures set forth in this manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, any forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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RACE DISCRIMINATION AND HARASSMENT; AFFIRMATIVE ACTION

- ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.***, 143 S. Ct. 2141 (2023). The petitioner, a non-profit organization representing a group of anonymous Asian-American plaintiffs, filed separate lawsuits against Harvard College and the University of North Carolina ("UNC"), arguing that each school's race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Both Harvard and UNC used race as one of many criteria to assess applicants for admission. The schools believed that using race in this way fostered academic diversity among their student body and promoted a robust academic environment. In the Harvard admissions process, "race is a determinative tip" for a significant amount of the admitted African-American and Hispanic applicants. Both universities also conducted ongoing reviews to determine the continuing need for using race as an admissions criterion. After separate bench trials, both admissions programs were found to be permissible. In the Harvard case, the First Circuit Court of Appeals affirmed and the Supreme Court granted *certiorari*. In the UNC case, the Supreme Court granted *certiorari* before judgment. *Held:* Reversed. The Court held that Harvard's and UNC's admission programs violate the Equal Protection Clause. The Court first addressed standing: Harvard and UNC argued that the petitioner lacked standing because it was not a genuine membership organization that was controlled and funded by its members. The Court found that petitioner qualified as a voluntary membership organization because it has identifiable members who support its mission and whom the petitioner represents in good faith. On the merits, the Court disagreed with the schools' assertions that they are owed deference when using race to benefit some applicants. The Court explained that deference cannot be given where the goals of admissions programs are not sufficiently measurable to permit meaningful judicial scrutiny. Moreover, the Court determined that because college admissions are zero-sum—for every member of a favored group who is admitted, a member of a different group is denied admission—some applicants who benefit from the schools' race-based criteria necessarily are advantaged over those applicants who do not benefit. Therefore, the Court held, race-based admissions criteria functioned to use race as a "negative" in violation of the Equal Protection Clause. Moreover, the Court found that the admissions programs impermissibly involved "stereotyping" because when a school admits a student on the basis of race, it is assuming that all students of that race think alike. Lastly, the Court noted that the schools' admissions programs lacked a logical end point, as required by *Grutter v. Bollinger*, 539 U.S. 306 (2003) (which the majority did not say it was overruling).
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RACE DISCRIMINATION AND HARASSMENT: REVERSE RACE DISCRIMINATION

- ***Groves v. South Bend Cmty. Sch. Corp.***, 51 F.4th 766 (7th Cir. 2022). The plaintiff, a white high school athletic director, applied in 2017 for the district-wide position of corporation director of athletics, along with four other candidates. Ultimately, the plaintiff lost out to a Black candidate. The plaintiff then filed suit against his employer, alleging reverse race discrimination. In 2019, the defendant announced the elimination of the corporation director of athletics position and the creation of a hybrid dean of students/athletics position at each of its four high schools. Nine candidates applied to the four new positions, including the plaintiff and the Black candidate who had obtained the corporation director of athletics position for which the plaintiff had previously applied. The Black candidate was offered one of the four positions. The plaintiff was not. Thereafter the plaintiff amended his complaint to add a claim of race discrimination based on his not receiving the new position. The district court granted summary judgment to the defendant, finding the plaintiff had not provided any admissible evidence showing his failure to obtain either position was because of his race. *Held*: Affirmed. The parties agreed that the case turned on the final *McDonnel Douglas* factor, whether the plaintiff could show that the defendant's nondiscriminatory reasons for choosing the Black candidate amounted to pretext for discrimination. The plaintiff argued the defendant's reasons were pretextual because he was more qualified than the Black candidate for both positions. The defendant explained that résumé comparisons were only part of the picture. Applicants' interview performance "greatly mattered" and on this, the Black candidate outperformed the plaintiff "by a long shot." Though the interview assessments were subjective, the plaintiff offered no contradictory evidence that race influenced either decision. The plaintiff also argued that the defendant did not follow its own written policy of running background checks on new hires, which would have shown the Black candidate had two felony convictions from the 1990s. However, the plaintiff offered no evidence contradicting the defendant's evidence that this policy applied only to external hires.

RACE DISCRIMINATION AND HARASSMENT: REVERSE RACE DISCRIMINATION

- ***Runkel v. City of Springfield***, 51 F.4th 736 (7th Cir. 2022). The plaintiff, a white city employee, brought a Title VII action against the defendants, alleging race discrimination and retaliation. The plaintiff sought her former supervisor's job, but the promotion instead went to a Black employee whom the plaintiff had been supervising. The defendants offered her a $5,000 salary increase as "an apparent consolation prize." In response to the promotion decision, the plaintiff became upset, told a city official that she believed the decision was discriminatory, and caused a "disturbance in the office." The defendants subsequently withdrew the offered salary increase and disciplined the plaintiff for the disturbance. The district court awarded summary judgment to the defendants on both claims. *Held:* Reversed and remanded. In regard to the reverse discrimination claim, there was a dispute of material fact regarding whether the defendants had a "reason or inclination to discriminate invidiously" against the plaintiff because the mayor later cited his hiring of the Black employee as an example of how his administration was "moving toward reflecting the city's demographics." Furthermore, there was evidence that the Black employee's résumé was not sent to the mayor until after he offered her the role. The mayor also testified that he made the decision to promote the Black employee without ever comparing her to the plaintiff.

RELIGIOUS DISCRIMINATION AND HARASSMENT: Duty to Accommodate Religious Beliefs and Practices

- ***Groff v. DeJoy***, 143 S. Ct. 2279 (2023). The plaintiff, an Evangelical Christian who believes that Sundays should be devoted to worship and rest, sued the U.S. Postal Service ("USPS") under Title VII, alleging that USPS failed to accommodate his religion when it denied him Sundays off from work. When the plaintiff began working for USPS, his position generally did not involve Sunday work. However, that changed when USPS entered into an agreement to start facilitating Sunday deliveries for Amazon. Initially, the plaintiff was able to continue to avoid working Sunday shifts by transferring to a rural USPS station, but eventually that rural station also began making Sunday deliveries. As a result, the Sunday shifts that would have been assigned to the plaintiff were redistributed among other USPS staff, which created morale issues. The plaintiff received "progressive discipline" for his continued refusal to work on Sundays, eventually leading to his resignation. The plaintiff asserted that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." The district court granted summary judgment to USPS and the Third Circuit Court of Appeals affirmed, finding that accommodating the plaintiff met the *de minimis* cost standard, which, under Supreme Court precedent (*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)), the court said relieved USPS from the obligation to provide the accommodation. Specifically, the court said, exempting the plaintiff from Sunday work would impose a work burden on his co-workers, disrupt the workplace and workflow, and diminish employee morale. *Held:* Vacated and remanded. The Supreme Court held that Title VII requires an employer that denies a religious accommodation to show that the burden of granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business, and not just a *de minimis* burden. The Court clarified that "undue hardship" in context of religious discrimination under Title VII requires courts to determine whether a hardship would be substantial in the context of an employer's business in a common-sense manner.

RELIGIOUS DISCRIMINATION AND HARASSMENT: Duty to Accommodate Religious Beliefs and Practices

- ***Kennedy v. Bremerton Sch. Dist.***, 142 S. Ct. 2407 (2022). The plaintiff, a high school football coach, sued the school district under the First Amendment and Title VII for placing him on administrative leave when he refused to stop praying in the middle of the football field after his team's games. The district court granted summary judgment to the school district on all claims. The Ninth Circuit affirmed and rejected the plaintiff's argument that the school district failed to accommodate his religion and treated him unequally because of his faith, holding instead that the school district would have violated the Establishment Clause by allowing the plaintiff to engage in such religious public speech while performing his job duties. The court noted that the school district repeatedly offered to work with the plaintiff to find an accommodation that would insulate the school district from an Establishment Clause violation, which the plaintiff refused. Thus, the school could not reasonably accommodate the plaintiff without undue hardship. Further, the avoidance of an Establishment Clause violation constituted a legitimate nondiscriminatory reason for the school district's adverse employment actions. *Held*: The Supreme Court reversed, holding that the school district unduly burdened the plaintiff's rights under the Free Exercise Clause by suspending him for his decision to persist in praying quietly at midfield. The Court held that the plaintiff engaged in private speech, not government speech attributable to the school district, when he uttered prayers quietly at midfield without his players and determined that the school district's burdening of employee's rights under the Free Exercise and Free Speech Clauses could not be justified on ground his suspension was essential to avoid an Establishment Clause violation. Further, the plaintiff's private religious exercise was not impermissible government coercion of students to pray.

RELIGIOUS DISCRIMINATION AND HARASSMENT: Duty to Accommodate Religious Beliefs and Practices

- ***EEOC v. Wal-Mart Stores E., L.P.***, 992 F.3d 656 (7th Cir. 2021). The EEOC sued on behalf of a job applicant who received a job offer from Walmart for a full-time assistant manager position, but had his offer reevaluated when he revealed that, as a Seventh-day Adventist, he could not work between sundown Friday and sundown Saturday. The district court granted summary judgment to Walmart, finding that it had offered a reasonable accommodation to the applicant by proposing an hourly position instead of the full-time position, even though the level of pay was lower. *Held*: Affirmed. Accommodating the applicant would have hindered the store's ability to continue its rotating-shift scheme for assistant managers, leave the store short-handed at times or require it to hire another manager. The EEOC's proposed alternative accommodations, including that the applicant could have traded weekend shifts with other salaried assistant managers, would have shifted the duty to accommodate from Walmart onto those other workers, and would have imposed more than a slight burden on Walmart; that is more than what Title VII requires.

SEX AND PREGNANCY DISCRIMINATION: Pregnancy Discrimination

- ***EEOC v. Wal-Mart Stores E., LP***, 46 F.4th 587 (7th Cir. 2022). The EEOC sued the defendant distribution center on behalf of female employees over the defendant's policy of offering temporary light duty to employees injured on the job, but not to employees who were pregnant. The defendant required pregnant workers to go on unpaid leave. The EEOC claimed that this practice constituted sex and pregnancy discrimination. The parties filed cross-motions for summary judgment and the district court granted summary judgment to the defendant. *Held*: Affirmed. The three-step *McDonnell Douglas* burden-shifting framework applied to the Pregnancy Discrimination Act. First, a plaintiff must establish a *prima facie* case of pregnancy discrimination by showing that she belongs to a protected class, she sought an accommodation, the employer did not accommodate her, and the employer did accommodate others "similar in their ability or inability to work." Then the burden shifts to the employer to offer a legitimate, nondiscriminatory justification for denying the accommodation. If the employer can make this showing, the burden then shifts back to the plaintiff to show that the employer's policies impose a significant burden on pregnant workers and the employer's proffered reasons are not sufficiently strong to justify the burden, giving rise to an inference of intentional discrimination. Here, the defendant conceded that it excluded pregnant employees from its temporary light duty policy. However, the defendant offered evidence that the purpose of the policy was to implement a worker's compensation program that benefited employees injured on the job while limiting both the defendant's legal exposure under state worker's compensation law and decreasing the costs of hiring people to replace injured workers. The court held that offering temporary light duties to workers injured on the job pursuant to state worker's compensation law was a legitimate, nondiscriminatory justification for denying accommodations under the policy to everyone else, including pregnant women. The court distinguished the case from *Young v. UPS, Inc.*, 575 U.S. 206 (2015), where several categories of employees were granted light duty even though the pregnant employee was not, and the Supreme Court allowed the plaintiff the opportunity to prove that the distinction was discriminatory.

SEXUAL HARASSMENT: Severe or Pervasive

1. Sufficiently Severe or Pervasive

- ***Sharp v. S&S Activewear, LLC***, 69 F.4th 974 (9th Cir. 2023). Eight plaintiffs (seven women and one man) filed suit against their former employer, alleging that it allowed "sexually graphic, violently misogynistic" music to play constantly and publicly in their workplace, which created a hostile work environment in violation of Title VII. The plaintiffs alleged that despite "almost daily" complaints regarding the music, management allowed it to continue until litigation was imminent. The district court held that the plaintiffs failed to state an actionable Title VII sexual harassment claim because the music offended men and women alike, and granted the defendants motion to dismiss. The plaintiffs appealed. *Held*: Vacated and remanded. The court of appeals found that sexually foul and abusive music falls within a broader category of actionable, auditory harassment that may violate Title VII. Further, the fact that the music offended both men and women did not preclude the plaintiff's suit. Title VII protects men and women alike and does not require that one specific person be the target of the harassment.

SEXUAL HARASSMENT: Severe or Pervasive

1. Sufficiently Severe or Pervasive

- *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023). The plaintiff, a female construction worker, sued her former employer for sex discrimination, hostile work environment sexual harassment, and retaliation under Title VII. The plaintiff first began working for the defendant as a laborer, which is an administrative role, and later was promoted to a construction site "helper" position. She alleged that while she was working as a helper, her male supervisor discriminated against her by telling her she was not allowed to work at elevation, or above ground, because she was a woman and due to her physical female attributes. The plaintiff further alleged that she made several complaints about a male employee who sent her a picture of his genitalia, asked for a picture back of her breasts, and asked on several other occasions to touch her breasts. According to the plaintiff, these incidents caused her severe anxiety and depression, and she missed work to go to a doctor's appointment to treat her anxiety and depression. The defendant suspended her based on poor attendance and later terminated her employment. The district court granted summary judgment to the defendant, reasoning that the plaintiff did not face an adverse employment action and that her supervisor's restricting her from working at elevation was not an "ultimate employment decision" under Title VII. The district court further found that the plaintiff did face severe or pervasive harassment, but concluded that she could not establish a nexus between her alleged harassment and a "tangible employment action" by the defendant. The district court also held that she had not sufficiently opposed any unlawful action under Title VII, and as to the alleged harasser's conduct, that the plaintiff could not have reasonably believed his conduct was actionable under Title VII. The plaintiff appealed. *Held:* Reversed and remanded. First, the plaintiff's sex discrimination claim should have survived summary judgment because a reasonable juror could conclude that preventing the plaintiff from working at elevation effectively demoted her back to the laborer role she previously occupied. Moreover, working only on the ground made her less useful and a less-valuable asset than if she worked at elevation, making it less likely that she would be able to be promoted and advance in her career down the line. Second, the plaintiff's sexual harassment claim should have also survived summary judgment because she adequately showed she may have been suspended and terminated after she rejected sexual advances from a supervisor. Though one sexual-harassment incident is sometimes not enough to establish a Title VII claim, sometimes it can be. Sexual remarks and intimate contact make harassment more severe, and thus even isolated incidents can amount to severe or pervasive harassment. As such, a reasonable jury could find that the male employee's comment and nonconsensual massaging of the plaintiff was enough, based on the surrounding circumstances of the plaintiff's harassment, to be severe or pervasive enough. Lastly, the plaintiff's retaliation claim should have survived summary judgment because she adequately complained of an unlawful act under Title VII: not being allowed to work at elevation because, as her supervisor allegedly said, she was a woman. This, coupled with her complaints about the harassment she endured, supported her claim of retaliation.

DISABILITY DISCRIMINATION: Disability

- ***Mueck v. La Grange Acquisitions, L.P.***, 75 F.4th 469 (5th Cir. 2023). After being convicted the third time for driving while under the influence, Mueck, an alcoholic, was ordered to attend substance abuse classes that conflicted with his scheduled shifts. When Mueck was unable to find coverage for his shifts, his employer terminated him, citing the scheduling conflict. Mueck sued under the ADA, alleging intentional discrimination, failure to accommodate, and retaliation. The lower court granted summary judgment in favor of the employer on all three claims. Mueck appealed. *Held*: Affirmed. The Fifth Circuit held that Mueck had put forth evidence raising a triable issue of fact as to whether his alcoholism amounted to a disability due to his need to attend the substance-abuse classes. Specifically, the court held that even an episodic impairment can be a disability if it substantially limits a major life activity. However, the court reasoned that the employer had a legitimate, non- discriminatory reason for Mueck's termination: the conflict between the substance abuse classes and Mueck's shift schedule. There was no evidence that this reason was pretextual, so the court held that summary judgment was appropriate on the intentional discrimination charge. For the failure-to-accommodate charge, the court held that summary judgment was appropriate because Mueck never expressly requested accommodation for a disability, and his terse references to struggles with drinking did not give rise to a legal responsibility for the employer to probe whether Mueck was requesting a disability accommodation. Finally, because Mueck never requested an accommodation, he never engaged in protected activity, and the court held that summary judgment was appropriate for the retaliation charge as well.

DISABILITY DISCRIMINATION: Essential Job Duties

- ***Tafolla v. Heilig***, No. 21-2327, 2023 WL 5313520 (2d Cir. Aug. 18, 2023). The plaintiff, a clerk typist for a district attorney's office, suffered a spinal injury in a car accident. She asked that another employee temporarily take over her archival responsibilities, and submitted a doctor's note that included restrictions on bending, pushing and lifting over five pounds. However, her supervisor refused to reassign her archival responsibilities, mocked her, and said that if she encountered any files that weighed over five pounds, she did not have to touch them. Her employer issued a subsequent determination that the archival work was consistent with the doctor's note, and there were no other accommodations available. She took medical leave, and was terminated a year later as a result of her prolonged absence. She sued under the ADA, and the employer was granted summary judgment. She appealed. *Held:* Reversed and remanded. The Second Circuit relied on the EEOC standard and reasoned that "essential duties" are fundamental to the position held, and that courts must give "considerable deference" to an employer's judgment about whether the functions are essential. But here, the employer in deposition specifically said that archiving was *not* essential to the job. Further, despite the employer's claims that it had fully granted the plaintiff's accommodation requests, the court concluded that a reasonable jury could find that the employer did not grant the requests, and that the employer unilaterally ended the interactive process when it issued the subsequent accommodation determination. Accordingly, summary judgment was unwarranted.

DISABILITY DISCRIMINATION: Discrimination Because of Disability

1. **Adverse Action Based on Unacceptable Behavior Caused by Disability**

- ***Lee v. L3Harris Techs.***, No. 22-15288, 2023 U.S. App. LEXIS 21704 (9th Cir. Aug. 18, 2023). L3Harris fired the plaintiff in June 2020 after a November 2019 incident in which he and another employee got in a profanity-laden argument. The plaintiff alleged that his termination was discriminatory due to his Post-Traumatic Stress Disorder ("PTSD") and retaliatory against him for reporting his coworker's misconduct. He filed suit under the ADA and a similar Hawaii statute. The district court granted summary judgment to L3Harris on all claims, and the plaintiff appealed. *Held*: The Ninth Circuit reversed the district court's decision as to summary judgment on the ADA claim. The plaintiff presented sufficient evidence to create a triable issue as to whether he was fired because of his disability, and a trier of fact could conclude that the concerns leading defendant to terminate the plaintiff's employment were based on his PTSD and stereotypical thinking about persons with PTSD, rather than his use of profanity.

RETALIATION: Burden of Proof

- ***Murray v. UBS Sec., LLC***, 43 F.4th 254 (2d Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023). The plaintiff alleged that UBS fired him in retaliation for reporting the company's alleged fraud on shareholders to his supervisor. He sued UBS under the whistleblower protection provision of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, and he ultimately prevailed at trial. UBS appealed, arguing that the district court did not instruct the jury that a SOX anti-retaliation claim requires a showing of the employer's retaliatory intent. Section 1514A prohibits publicly traded companies from taking adverse employment actions to "discriminate against an employee...because of" any lawful whistleblowing act. 18 U.S.C. § 1514A(a). *Held:* The Second Circuit found that this provision requires a whistleblower-employee like the plaintiff to prove by a preponderance of the evidence that the employer took the adverse employment action against the employee with retaliatory intent. The district court's legal error was not harmless and the appellate court vacated the jury's verdict, remanding to the district court for a new trial. The Supreme Court has granted *certiorari* to decide whether a whistleblower must prove his employer acted with retaliatory intent, or whether lack of retaliatory intent is part of the affirmative defense on which the employer bears the burden of proof.

RELIATION: Protected Activity

1. Generally

- ***Logan v. City of Chicago***, 4 F.4th 529 (7th Cir. 2021). The plaintiff, an Aviation Security Officer for the City of Chicago, alleged that he was wrongly singled out for discipline, and as a result, became ineligible for promotion, in violation of Title VII. The plaintiff alleged that the adverse actions were in retaliation for his confronting his supervisor about the supervisor's flirtation toward a woman the plaintiff was dating at the time, who worked at the same airport as the plaintiff, but for the U.S. Customs and Border Protection (the "CBP"), not the City. The district court found that no reasonable jury could find in favor of the plaintiff on his retaliation claim, because even if the plaintiff subjectively believed that he was engaging in a Title VII protected activity by opposing an unlawful practice, that belief was not subjectively reasonable—the supervisor and the woman the plaintiff was dating did not have an employer-employee relationship. *Held*: Affirmed. Title VII did not apply to the plaintiff's conduct. The purpose of Title VII is the eradication of discrimination by employers against employees, and thus, an employer can only incur liability for sexual harassment under Title VII if an employer-employee relationship exists. Here, because the woman the plaintiff was dating worked for the CBP, not the City for which the plaintiff and his supervisor worked, Title VII did not apply to the plaintiff's complaint to his supervisor.

RELIATION: Nexus

Carroll v. Horizon Bank, No. 22-1479, 2023 WL 1096350 (7th Cir. Jan. 30, 2023). The plaintiff, a senior commercial credit officer working at a bank, brought an action against his former employer alleging that he was fired in retaliation for advocating for pay equity for his female subordinate. The plaintiff had recommended the female subordinate for a promotion along with two male employees and told bank executives that they would need to increase her pay post promotion because the men earned more than she. He alleged that the executives approved of the reorganization plan, so he increased the female subordinate's responsibilities and told her that the bank was reviewing her salary. After following up with the human-resources department several times, he was told that the CEO still had not approved the increase. In her year-end review, the female subordinate complained that she had not received a raise because she is a woman. A few months later, the plaintiff was fired for ineffective management and insufficient commitment to improve. The district court entered summary judgment for the defendant, holding that the plaintiff failed to present evidence of a causal link between his advocacy for pay equity and the bank's decision to fire him and rejecting the plaintiff's contention that the defendant's reason for firing him was pretextual. The plaintiff appealed. *Held:* Affirmed. The Seventh Circuit held that the district court correctly granted summary judgment for the defendant, stating that the plaintiff had not put forward enough evidence to show that the bank's executives used his push for the female employee's raise as a reason to fire him. A valid retaliation claim requires that the decisionmaker know of the protected activity, but that does not mean one can infer retaliation from the decisionmaker's knowledge alone. Although the plaintiff alleged facts to support an inference that bank executives were aware of the plaintiff's advice to raise the female subordinate's pay after the proposed promotion and that the female subordinate later complained about her salary, they do not show, in isolation or together, that the defendant fired him *because* he urged the bank to avoid a pay disparity. For a jury to draw an inference of causation from suspicious timing alone, the adverse action must come days, not months, after the protected activity. Additionally, the court noted that the bank's executives thought the plaintiff's promotion plan was a good idea.

STATUTE OF LIMITATIONS AND CONTINUING VIOLATION DOCTRINE

A. Statute of Limitations

- ***Kellogg v. Ball State Univ.***, 984 F.3d 525 (7th Cir. 2021). The defendant school told the plaintiff, a teacher, that she did not need a large starting salary because her husband was also working. Twelve years later, after complaining that she was paid less than similarly-situated male colleagues, the plaintiff sued under Title VII and the Equal Pay Act. The district court granted summary judgment to the defendant, refusing to consider the hiring conversation as the allegations fell far outside of the statute of limitations. The plaintiff appealed. *Held*: The court of appeals reversed. The paycheck accrual rule, as codified by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), allows a new cause of action to arise every time a plaintiff receives a paycheck that is affected by an earlier discriminatory act. As time-barred acts may be used to support a timely claim, the defendant's earlier comments should have been considered in determining whether the defendant had nondiscriminatory reasons for the pay disparity.

ADMINISTRAVEI PROCESSES

- ***Simko v. United States Steel Corp.***, 992 F.3d 198 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 760 (2022). The plaintiff, a hearing-impaired larryman, alleged that he was denied accommodation for his hearing loss, and that his trainer for a new position refused to approve completion of the training because of the hearing loss. The plaintiff filed an EEOC complaint for discrimination based on disability, but was terminated for a safety violation before the EEOC investigation could begin. Roughly three months later, the plaintiff sent the EEOC a 14-page file of handwritten notes, including a paragraph that concluded "I believe anyone who familiarizes themself [*sic*] with the details of the case will clearly see it as retaliation for filing charges with the EEOC." Approximately a year and a half later, the plaintiff's counsel filed an amended EEOC charge that included a specific claim for retaliation. The EEOC eventually issued a determination of reasonable cause that the employer had retaliated against the plaintiff. After attempted conciliation failed, the plaintiff filed suit asserting only a single count of retaliation; the lawsuit did not allege either disability discrimination or failure to accommodate. The district court determined that the plaintiff failed to file a timely EEOC charge asserting retaliation, as the amended complaint came 521 days after the termination of employment. The plaintiff appealed. *Held*: Affirmed. To file an ADA claim in federal court, a plaintiff must exhaust administrative remedies. In Pennsylvania, an aggrieved party must initiate the pre-suit procedure by filing a charge with the EEOC within 300 days of the challenged employment action. Because the amended complaint came 521 days after termination, the plaintiff failed to satisfy the pre-suit requirements. The court declined to determine whether the handwritten note constituted a charge, as the issue was never raised in the district court. Further, although suggested by the EEOC, the court declined to consider whether equitable tolling was available because the plaintiff did not present the issue on appeal. Finally, the retaliation claim could not be bootstrapped onto the original disability claim because the underlying facts of the two claims were sufficiently distinct.
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ARBITRATION: Federal Jurisdiction

- ***Badgerow v. Walters***, 142 S. Ct. 1310 (2022). After an arbitrator dismissed the plaintiff's claims under the Financial Industry Regulatory Authority ("FINRA"), the plaintiff petitioned a Louisiana state court to vacate the dismissal. The defendants removed the action to federal court. The plaintiff then moved to remand, asserting lack of subject-matter jurisdiction. The district court denied the motion and the Fourth Circuit affirmed, reasoning that the district court had subject-matter jurisdiction over the petition because of the presence of a federal claim in the FINRA arbitration. *Held*: Reversed and remanded. Federal law claims in the underlying dispute are not sufficient to open the doors to federal court to confirm or vacate an arbitration decision. Applying the text of the FAA, the Court concluded that the "look through" approach adopted in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), for section 4 of the FAA does not apply to requests to confirm or vacate arbitration decisions under sections 9 and 10 of the FAA. The Court's textual analysis focused on the language in section 4. That provision states that a party may petition for an order to compel arbitration in a district court which, but for the arbitration agreement, would have jurisdiction over the controversy. The Court explained that section 4's text required the 'look through' approach." In contrast, the Court then reasoned that sections 9 and 10 have "none of the statutory language on which *Vaden* relied." Given that lack of textual support, the Court held that it could not pull "look-through jurisdiction out of thin air" for applications to confirm or vacate arbitral decisions under sections 9 and 10. Accordingly, the Court concluded, the "look-through" approach does not apply to proceedings under sections 9 and 10.

ARBITRATION: Federal Jurisdiction

- ***Southwest Airlines Co. v. Saxon***, 142 S. Ct. 1783 (2022). The plaintiff, a ramp supervisor responsible for overseeing ramp agents' loading and unloading of cargo on and off airplanes, brought a putative collective action against Southwest Airlines under the Fair Labor Standards Act. Because the plaintiff's employment contract required her to arbitrate this dispute individually, Southwest moved to dismiss. The district court granted the motion to dismiss, holding that the plaintiff did not belong to a "class of workers engaged in foreign or interstate commerce" such that the Federal Arbitration Act's exemption applied. The court of appeals reversed, holding that the act of loading cargo to be transported interstate is itself commerce. *Held*: Affirmed. The Supreme Court agreed with the court of appeals, finding that the Federal Arbitration Act's exemption applied to the plaintiff based on the ordinary meaning of the exemption. The plaintiff was a member of a "class of workers" based on what she did at Southwest, not what the airline did generally. The plaintiff was "engaged in foreign or interstate commerce" because she was involved in transporting goods across state and/or international borders.

DAMAGES AND ATTORNEYS' FEES

A. **Damages**

- ***Cummings v. Premier Rehab Keller, P.L.L.C.***, 142 S. Ct. 1562 (2022). The plaintiff, a deaf and blind woman, sued the defendant from which she sought physical therapy services for failing to provide an American Sign Language interpreter at her physical therapy sessions. She alleged violations of the Rehabilitation Act and the Affordable Care Act ("ACA"). The district court determined that the plaintiff's only compensable injuries were emotional in nature and held that such injuries are not recoverable in private actions under either statute. Thus, the district court dismissed the action. *Held*: Affirmed. Under the Spending Clause, Congress passed a number of statutes prohibiting recipients of federal financial assistance from discriminating based on certain protected characteristics. These statutes include Title VI, Title IX, the Rehabilitation Act, and the ACA. The Court found that federal funding recipients would not have been aware that they would be liable for emotional-distress damages under these antidiscrimination statutes when they accepted the funding. Accordingly, such damages are not recoverable under these statutes.
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Real Life Scenarios in the Employment World

By:

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Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Anthony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters.

Anthony is an AV® Preeminent™rated attorney based on Martindale-Hubbell's peer review ratings, has been selected for inclusion in *Super Lawyers in America*® ten times and has been selected for inclusion since 2016 in the *Best Lawyers*® *in America* publication. *Best Lawyers in America*® recognized him "Lawyer of the Year," Fort Wayne in 2017 and 2018 in the area of Employment Law - Management and in 2020 and 2023 in the area of Litigation- Labor and Employment and in 2023 for Labor Law- Management. He has presented over 250 speeches and/or seminars locally and nationwide. He is a member of the Allen County (Indiana) and Ohio Bar associations, as well as the Indiana State Bar Association.

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An AV Preeminent™ rated attorney by Martindale-Hubbell and has been selected for inclusion since 2021 in *The Best Lawyers® in America* publication in the areas of labor law- management and employment law- management. He serves as a member of the board for Brightpoint, the Mad Anthonys Children's Hope, and he is a past board chair for Easter Seals/ARC of Northeast Indiana. He was appointed to the Indiana University - Fort Wayne School of Nursing External Advisory Board. He has presented more than 100 lectures/seminars to statewide and local audiences on various labor and employment topics.

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Rachel serves on the boards of directors for Mental Health America of Northeast Indiana and the Fort Wayne Children's Zoo. She has given presentations on multiple legal topics, including the "Workplace Survival Guide" and "Finding Free Legal Research Sites and Free Case Law," and she was a contributor to a publication about medical malpractice claims. Since 2015, she has been selected a "Rising Star" by the *Indiana Super Lawyers*© publication and was selected in 2023 for inclusion in *The Best Lawyers in America*® in the area of Litigation-Labor and Employment.

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Disclaimer

- The information and procedures set forth in this manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, any forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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Welcome (Back) to Midtown, USA

The setting is Midtown, USA, population approximately 300,000. John D. Smith, a resident of Midtown, started JDS Company, which manufactures widgets, delivers its products throughout Midtown, and recycles worn out widgets. JDS Company employs **over 50** employees.

John generally looks after all the business affairs of JDS Company. Randy Reliable is the acting HR manager and personally directs all employees and the day-to-day activities in the office. John has a great deal of confidence in Randy and generally leaves all personnel decisions in Randy's hands, including the hiring and firing of all employees.

JDS Company's *Medical Leave* Policy

A medical leave of absence is available to any employee who is not otherwise eligible for leave under the Family and Medical Leave Act of 1993 or to any employee who has exhausted leave entitlement under the FMLA. A medical leave of absence of 30 days may be granted to employees who are off work in excess of more than 3 consecutive working day(s) due the employee's own illness or accident. The duration of the leave will be based upon reports by the employee's personal physician which must be submitted to Human Resources prior to leave approval. Any requests for extension of a medical leave of absence are based on the sole discretion of JDS Company.

Hypo No. 1a

- **Facts:**

  Randy recently interviewed Mary for an executive assistant position. Following the interview of other candidates, Randy decided that Mary was the most qualified applicant for the position. Randy offered Mary the position. After she received the offer, Mary disclosed to Randy that she was expecting in five months, and asked Randy what JDS Company could do to accommodate her need for leave after delivering her child, and accommodations for lactation breaks when she returns from leave.

- **Question(s):**

  1. What is Mary entitled to by law?
  2. What is Mary entitled to by policy?

Hypo No. 1b

- **Facts:**

  Mary returns to work after delivering her child. JDS Company ensured there was a dedicated area for Mary to take her lactation breaks. All is good on this front.

  However, Mary is now exhibiting performance issues. She is making grammatical errors that she did not make before leave. She has failed to calendar three important customer meetings for Mr. Smith, resulting in customer backlash.

- **Question(s):** What should JDS Company to address the performance issues?

Hypo No. 2a

- **Facts:**

  Edna, a shop clerk of 25 years, disclosed to Randy that she has been diagnosed with cancer, and that she would need to take a leave of absence for treatment.

- **Questions:**

  1. What should JDS Company's initial response be?
  2. What happens if/when Edna exhausts her FMLA leave?

Hypo No. 2b

- **Facts:**

  After Edna exhausted her FMLA leave, JDS Company approved an additional medical leave of absence of 12 weeks (or 3 months). As Edna nears the end of the Company-approved extended leave of absence, Randy has a call to check in with Edna about her return to work. During their phone call, Edna informs Randy that she has planned to have an elective surgery related to her cancer diagnosis and requested (another) 30-day leave of absence.

- **Question(s):** What should JDS Company's response be?

Hypo No. 2c

- **Facts:**

  Before Edna went out on FMLA leave, Edna executed a wage deduction authorization form. The authorization form gave JDS Company the authority to deduct health insurance premiums from Edna's paychecks for the time period in which she was still getting paid. In the form, Edna also authorized JDS Company to deduct premiums from her paychecks when she returned from her leave of absence. Midway through her non-FMLA leave of absence, Edna revoked her authorization for wage deductions.

- **Question: What, if anything, can JDS Company do to recoup the premiums from Edna if she does not return to work?**

Hypo No. 3a

- **Facts:**

  David has been working for JDS Company for 6 months. David is a general laborer on the manufacturing line. At the beginning of employment, David exhibited some minor performance issues. However, more recently, David left his station unattended without completing LOTO procedures. Both times, David's supervisor, Tim, addressed the issue with verbal coachings only. Also, Tim told Randy that he (the supervisor) has observed some odd behavior from David, not normally characteristic of David.

  Now, David has left his station without completing LOTO procedures for a third time.

- **Question:** Based on these facts, how should JDS Company address these ongoing issues?

Hypo No. 3b

- **Facts:**

  Randy and Tim meet with David to discuss the safety issues. During the meeting, David discloses that he has a long history of anxiety and depression and that he stopped taking his medication just after he started working at JDS Company. He does not believe he needs to take his medication.

- **Question:** What can and/or should JDS Company do?

Hypo No. 3c

- **Facts:**

  JDS Company approved a 30-day medical leave of absence for David and connected David with JDS Company's EAP. David returned to work. Within a week of his return, David commits a 4th safety infraction.

- **Questions:**
  1. Now what?
  2. Do you think the plan of action would be different if JDS Company had only approved David for a 1-week leave of absence initially?

Hypo No. 4a

- **Facts:**
  Marty is a Team Lead, which a full-time (40 hours per week) position. Marty has been with JDS Company for 2 years. Marty and his wife have a child with special needs. Because of the child's condition, the child must attend regular weekly doctor's appointments, and both parents need to be present. On January 2nd, Marty submitted a request for intermittent FMLA leave. The accompanying doctor's note reads:

  > "Marty should be permitted leave as needed to attend child's appointments and is able to work at least 5 hours per day in a workweek."

- **Question:** What should Randy do with this request?

Hypo No. 4b

- **Facts:**
  JDS Company approves Marty's request for intermittent FMLA leave. For the first three weeks of January, Marty worked in accordance with the doctor's note. However, during the last week of January, Marty missed the entire week of work, reporting each of those days as FMLA leave.

- **Question:** Can JDS Company ask Marty for recertification?

Hypo No. 5a

- **Facts:**

  Judy has been with JDS Company for several years. Judy is the onsite occupational nurse during first shift.

  Judy announced that she was expecting her second child. About 8 weeks before Judy's leave began under the FMLA, JDS Company informs Judy that JDS Company has also hired an onsite part-time physician, Dr. Tammy.

  Judy returns from leave and presents Randy with a doctor's note, which states that Judy is not permitted to work alone with Dr. Tammy because it causes Judy stress.

- **Question:** What should JDS Company do?

Hypo No. 5b

- **Facts:**

  JDS Company considers possible accommodations for Judy's request. JDS Company proposed the following accommodation:

  At times when a patient is not in the examination room, a member of the administrative staff would be present in the room (working from their laptop). When a member of the administrative staff was not available, the door to the medical area would remain open, or Judy could choose to complete her paper work in another area of the administrative offices.

  Rather than accept the accommodation, Judy presented a new doctor's note stating that Judy was not permitted to work with Dr. Tammy at all because it creates too much stress on Judy.

- **Question:** What should JDS Company do?

Hypo No. 5c

- **Facts:**

  JDS Company was unable to accommodate Judy based on the essential functions of her position. There were no vacant positions available for which she was qualified. Therefore, JDS Company had to part ways with Judy.

  Judy has filed a charge of discrimination, alleging that JDS Company discriminated against Judy in violation of the Pregnant Workers Fairness Act. Judy was nursing. The stress caused by working with Dr. Tammy decreased Judy's milk supply.

- **Question:** Does this change the outcome?

Hypo No. 6a

- **Facts:**

  Jimmy has been employed with JDS Company for 10 years. He is the nightshift warehouse clerk. Part of his duties include inspecting the entire warehouse by himself at allotted times during his shift. Last week, Jimmy submitted a doctor's note to Randy which stated that Jimmy was not permitted to work alone because of a seizure disorder. Jimmy asked Randy if working from home was a potential accommodation.

- **Questions:**
  1. Does JDS Company have to provide the requested accommodation?
  2. Can JDS Company request additional information from Jimmy's healthcare provider?

Hypo No. 6b

- **Facts:**

  With Jimmy's written consent, Randy spoke with Jimmy's doctor. The doctor informed Randy that Jimmy would not be able to work from home because Jimmy would be by himself during the night. Therefore, that is not a reasonable accommodation.

  Randy meets with Jimmy to discuss his conversation with the doctor. During the meeting, Jimmy discloses that he got the doctor's note because he doesn't like inspecting the warehouse because there hasn't been air conditioning or heat at night for the past three months. Jimmy never complained to Randy about this issue before then. Even so, Randy told Jimmy that those issues had been fixed. Jimmy withdrew his request for an accommodation.

- **Question:** What should JDS Company do now?

Hypo No. 7

- **Facts:**

  Teresa is one of the accountants in JDS Company's accounting department. She has a wealth of knowledge about financial forecasts in the widget industry. Teresa approaches John to discuss the possibility of Teresa doing consulting work on the side – providing general financial opinions for other companies in the widget industry. John told Teresa that he would think about it and get back to her. Before John could provide Teresa with an answer, Teresa goes out on leave under the FMLA.

  While Teresa is out on leave, co-workers report to John and Randy that Teresa has a website that advertises her consulting business.

- **Question: Can JDS Company contact Teresa while she is on FMLA leave to discuss the issue?**

Hypo No. 9

- **Facts:**

  Donny is a general laborer who works first shift. This morning, he came into work with all sorts of attitude. Donny got into a verbal argument with Jack, and then escalated the argument to a physical fight. The encounter was captured on company video. JDS Company terminates Donny for his conduct, which is a violation of company policy.

  Unfortunately, Donny was injured because of the fight. He did not report the injury before his termination. He also did not submit a claim to JDS Company's worker's compensation carrier.

  Three months after his termination, JDS Company receives service of a lawsuit filed by Donny. Donny alleges that JDS Company terminated Donny in retaliation of his need to file a worker's compensation claim.

- **Question: Does Donny have a valid claim?**

Hypo No. 10

- **Facts:**

  Jana submitted a complaint of harassment to Randy. Jana claims that her female supervisor, Rhonda, treats Jana less favorably than her male counterparts. Jana provided a detailed timeline of each event that has occurred since she began working at JDS Company 6 months ago.

  Per company policy, Randy launches an investigation. He requests Jana's interview first. Randy would like to record his interview of Jana (and others).

- **Question: Can JDS Company record investigatory interviews?**

Hypo No. 11

- **Facts:**

  Paul's job is to load and unload trucks for JDS Company. JDS Company pays Paul based on the number of truck he loads and unloads (versus an hourly rate).

- **Question: How does JDS Company calculate Paul's regular rate of pay to determine Paul's overtime rate?**

Hypo No. 12

- **Facts**

  Sam is a sales representative for JDS Company. Sam is paid $16.00/hour for face-to-face customer calls (e.g., visiting facilities), and $14.00/hour for administrative work related to any sales he makes. From time to time, Sam works over 40 hours a week. For example, Sam recorded 50 hours during work during the last workweek, 30 hours of face-to-face customer calls and 20 hours of administrative work.

- **Question: How does JDS Company calculate Sam's regular rate of pay to determine Sam's overtime rate?**

Hypo No. 13

- **Facts:**

  Ava is a department manager. She is a non-exempt employee, but paid on a salary basis. Ava and JDS Company have agreed to the following work hours: 10 hours per day, six days on, two days off.

- **Question: How does JDS Company calculate Ava's regular rate of pay to determine Ava's overtime rate?**

Employee Benefits Update

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Larry W. Rudawsky has over thirty years of experience in the area of employee benefits and has extensive knowledge in the areas of reviewing, developing and implementing defined benefit plans, defined contribution plans, non-qualified deferred compensation plans, employer-sponsored IRA plans and managed IRAs. Larry has overseen regulatory compliance for qualified, nonqualified, and VEBA plans, and he has drafted plan documents for Taft-Hartley, 401(a), 401(k), 403(b), 457 and 409A plans. He counsels clients on employee benefit issues in mergers and acquisitions, on equity incentive compensation, and on the design and operation of Employee Stock Ownership Plans (ESOPs).

Prior to joining the firm, he was an attorney with a firm in New York, served as the Vice President and Retirement Services Manager for a multi-state trust company and was the Senior Retirement Plan Administrator for a 150-year-old financial institution in Pennsylvania.

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Agenda

- Recent Litigation
- No Gag Attestation
- Form 5500 for Health and Welfare Plans
- Transparency in Coverage: Machine Readable Files
- Long-Term Part-Time Employees in 401(k) Plans

Johnson & Johnson Litigation

A New Era of Health Plan Litigation

- **Background**: Ann Lewandowski, a Johnson & Johnson employee, filed a class action lawsuit alleging mismanagement of drug benefits, potentially setting a precedent for future litigation against companies managing health and welfare plans.
- **The Lawsuit**: Filed in the US District Court, the suit accuses Johnson & Johnson of mismanaging its health plan by overpaying for generic specialty drugs through its pharmacy benefit manager, Express Scripts Inc.
- **Implications**: This lawsuit could signal a wave of litigation against companies, especially those utilizing pharmaceutical industry middlemen to negotiate drug pricing and rebates, similar to past lawsuits against mismanagement in 401(k) plans.

Legal and Regulatory Background

ERISA and Pharmacy Benefit Managers

- **ERISA Fiduciary Duty**: The lawsuit centers on alleged breaches of fiduciary duty under the Employee Retirement Income Security Act (ERISA) concerning the management of health plan funds and pharmacy benefits.
- **Role of Pharmacy Benefit Managers (PBMs)**: Express Scripts Inc., as a PBM, is accused of negotiating inflated prices for generic specialty drugs, highlighting concerns over the transparency and fairness of PBM practices in health plan management.
- **Emerging Litigation Trends**: Similar to suits against fiduciary mismanagement in retirement plans, this case reflects growing scrutiny over how health plans manage and negotiate drug benefits, potentially leading to more litigation in this area.

The Allegations Against Johnson & Johnson

Key Claims and Potential Impacts

- **Specific Allegations**: The lawsuit alleges Johnson & Johnson's health plan paid over $10,000 for a 90-day prescription of generic drug teriflunomide, which could be obtained for as little as $28, suggesting a breach of fiduciary duty by agreeing to such inflated prices.
- **Impact on Employees**: The overpayment allegedly resulted in higher costs for employees, including increased premiums, deductibles, and out-of-pocket expenses, while potentially limiting wage growth.
- **Legal Scrutiny**: The court will examine the processes Johnson & Johnson used to select and monitor its drug benefits, focusing on whether these actions were prudent and in the best interest of plan beneficiaries.

Employer Liability and Mitigation Strategies

Navigating the Future of Health Plan Management

- **Mitigating Liability**: Employers can reduce liability risks by engaging in prudent processes for selecting and monitoring service providers, ensuring transparency and accountability in managing health plans.
- **The Role of Transparency**: Increased transparency from PBMs and a more detailed examination of contracts and claims data are essential for employers to ensure they are receiving fair value and complying with fiduciary duties.
- **Looking Beyond Major PBMs**: The lawsuit may encourage employers to consider alternative PBMs that offer more transparent practices, potentially leading to better drug pricing and health plan management.
- **Legal and Industry Implications**: This case highlights the importance of diligent health plan management and could lead to increased legal scrutiny and regulatory changes aimed at improving transparency and fairness in drug pricing.

Other Litigation in Health and Welfare Plans

Key Cases

- **Litigation Trends**: Recent years have seen a significant increase in litigation involving health and welfare plans, focusing on areas such as benefit denials, fiduciary breaches, and compliance with federal regulations.
- **Key Areas of Dispute**: Disputes often arise from plan administration, the denial of benefits, failure to follow plan terms, improper denial of claims for mental health services, and violations of the Affordable Care Act (ACA) and the Employee Retirement Income Security Act (ERISA).
- **Notable Case: Mental Health Parity**: One significant case involved a class action lawsuit against a large insurer for failing to provide equal benefits for mental health and substance use disorder treatments, in violation of the Mental Health Parity and Addiction Equity Act.
- **Impact of Litigation**: These cases highlight the importance of compliance with health and welfare plan regulations and underscore the potential consequences for failing to meet legal and regulatory standards.

Fiduciary Duty Violations in Health Plans

Recent Legal Actions

- **Definition of Fiduciary Duty**: Fiduciary duty in health and welfare plans refers to the obligation of plan administrators to act in the best interest of participants and beneficiaries, managing the plan prudently and in accordance with its terms and all applicable laws.
- **Case Example: Excessive Fees**: A notable lawsuit involved allegations against plan administrators for allowing excessive fees and costs to be charged to plan participants, contrary to their fiduciary duties under ERISA.
- **Legal Outcome and Implications**: The court's decision in such cases often emphasizes the importance of transparent, fair fee structures and the fiduciary's role in regularly reviewing and negotiating terms to ensure they are in the best interest of the participants.
- **Best Practices for Compliance**: To avoid litigation, it's crucial for fiduciaries to conduct regular fee and service reviews, ensure clear communication with participants, and maintain diligent oversight of plan operations and third-party service providers.

ACA Compliance and Litigation

Challenges and Enforcement Actions

- **ACA Compliance**: The Affordable Care Act (ACA) imposes numerous requirements on health and welfare plans, including coverage mandates, reporting obligations, and the provision of preventive services without cost-sharing.
- **Recent Litigation Trends**: Recent litigation has focused on employers' and plan administrators' compliance with ACA mandates, particularly around the provision of preventive services and contraceptive coverage.
- **Notable Case Study**: A case involving a large employer challenged the failure to provide certain ACA-mandated preventive services, leading to significant legal scrutiny and a reminder of the importance of strict compliance with ACA provisions.
- **Implications for Plan Sponsors**: This litigation underscores the necessity for plan sponsors to closely monitor and ensure compliance with ACA requirements to avoid penalties and legal challenges. It also highlights the importance of understanding evolving regulations and their implications for plan design and administration.

Attestation of No Gag Clause

Introduction to No Gag Clauses

- **Definition**: An attestation of no gag clause is a formal declaration that certifies the absence of any restrictions, particularly in contracts or agreements, that would prevent parties from discussing or disclosing certain information.
- **Importance**: This attestation is crucial in promoting transparency and freedom of speech, ensuring that individuals or entities are not legally bound to silence about specific matters.
- **Context**: Often used in employment contracts, legal settlements, and confidentiality agreements, it safeguards the rights of parties to communicate openly about their experiences or concerns without fear of legal retaliation.

Example of a Gag Clause in a Healthcare Contract

Restricting Information Disclosure

- **Gag Clause in Healthcare**: A gag clause in a healthcare contract is a provision that prevents providers from discussing or disclosing certain information about healthcare treatment options or costs with patients. These clauses can limit transparency and prevent patients from making fully informed decisions.
- **Typical Gag Clause Scenario**: A healthcare provider enters into a contract with a health insurance company that includes a gag clause. This clause prohibits the provider from disclosing to patients that the cost of a procedure or medication is cheaper if paid out-of-pocket rather than through their insurance.
- **Impact of Gag Clauses**: Gag clauses can lead to a lack of transparency, hindering patients' ability to make informed decisions regarding their healthcare options and potentially leading to higher costs or suboptimal treatment choices.

Implementing a No Gag Clause Attestation

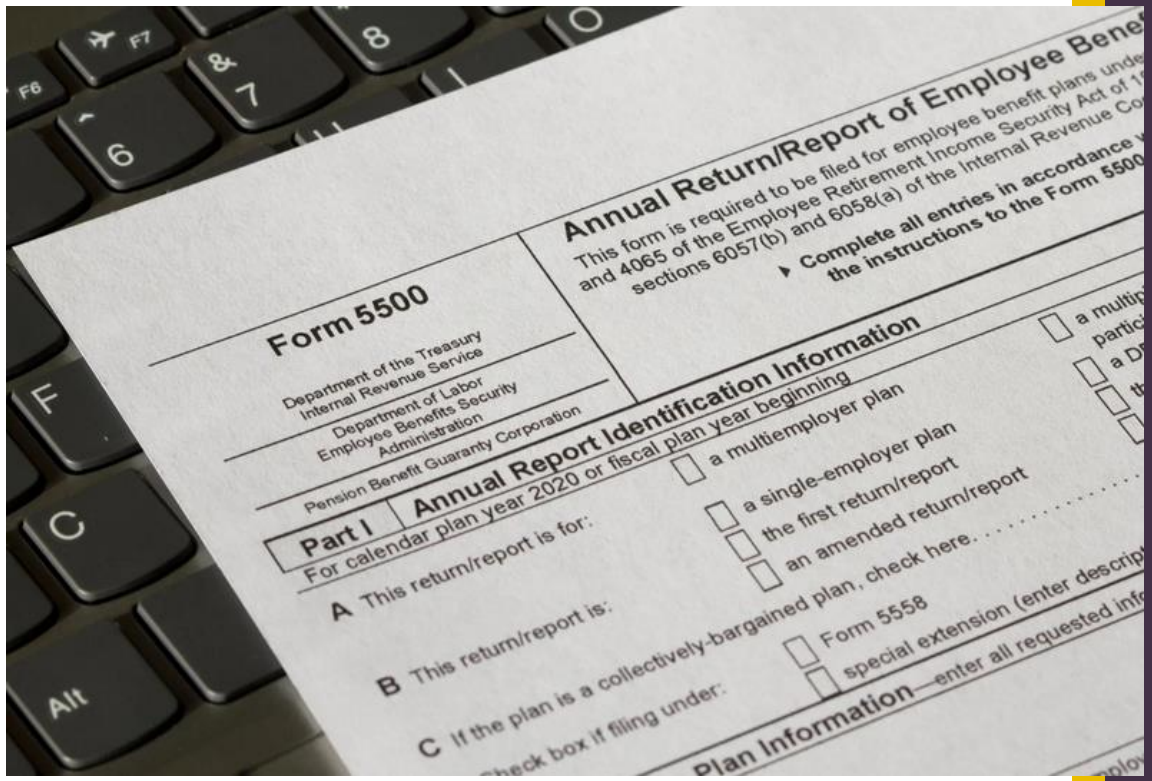
Key Steps and Considerations

- **Drafting the Clause**: Clearly articulate the scope and implications of the no gag clause within contracts or agreements to ensure comprehensive understanding and enforceability.
- **Legal Review**: Have the clause reviewed by legal professionals to ensure it complies with applicable laws and regulations, and that it effectively protects the parties' rights without overstepping legal boundaries.
- **Inclusion in Agreements**: Incorporate the no gag clause attestation in all relevant contracts and agreements, making it a standard part of the document templates used by the organization.
- **Awareness and Training**: Educate all parties involved about the significance and implications of the no gag clause to ensure they understand their rights and obligations.
- **Monitoring and Enforcement**: Establish mechanisms to monitor compliance with the no gag clause and enforce it when necessary, ensuring that its objectives are met and maintained throughout the duration of the agreement.

Form 5500 Filing Requirements

For Welfare Benefit Plans

- **Overview**: Employers may need to file Form 5500 not just for retirement plans but also for welfare benefit plans like medical, dental, vision, life insurance, etc., under the Employee Retirement Income Security Act of 1974 (ERISA).
- **Filing Requirements**: A Form 5500 is required for welfare benefit plans that have
  - 100 or more participants at the beginning of the plan year or
  - Are funded by employee contributions or through a trust, regardless of participant count
  - Exemptions for governmental and church plans.
- **Participant Definition**: A participant includes current employees covered by the plan, former employees covered (including those on COBRA or retiree medical), and former employees eligible for COBRA but not enrolled.



Determining Welfare Plan Count and Filing

Strategies for Compliance

- **Plan Identification**: Employers must assess how many welfare benefit plans they sponsor by reviewing governing documents and actual operations. This determines if benefits are provided under a single or multiple welfare benefit plans.
- **Welfare Wrap Plan**: To simplify compliance, sponsors may adopt a welfare wrap plan document to consolidate multiple welfare benefits into a single plan, leading to a singular Form 5500 filing requirement.
- **Inadvertent Non-Filing**: If an employer realizes they've failed to file required Form 5500s for their welfare plans, immediate action is necessary to file for each year and plan to minimize penalties.
- **Penalty Exposure**: Late Form 5500 filings can result in substantial penalties from both the DOL ($2,233 per day, no limit) and IRS ($25 per day, up to $15,000 per return).

Penalty Relief and DFVC Program

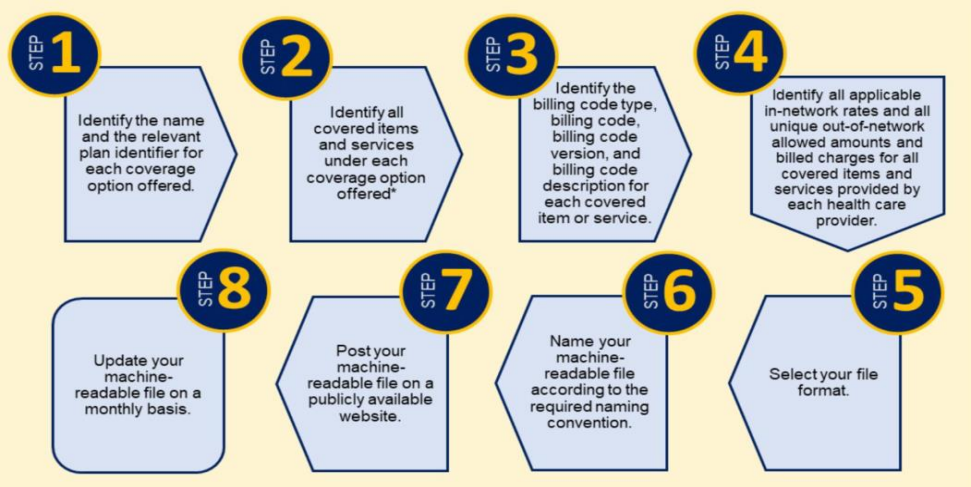
Mitigating Non-Compliance Risks

- **Delinquent Filer Voluntary Compliance (DFVC) Program**: The DFVC program offers a way for plan sponsors to file late Forms 5500 with reduced penalties, applicable before receiving a written failure-to-file notice from the DOL.
- **Strategic Filing**: Filing under the DFVC program is highly recommended to mitigate penalty exposure. For plans with less than 100 participants, the cap is $750 per return, and for those with 100 or more, it's $2,000, with further reductions for multiple plan years.

8 Steps to In-Network Rate and Out-of-Network Allowed Amount Machine-Readable File

Compliance with Transparency in Coverage Rules

- **Introduction**: Starting July 1, 2022, health plans and issuers were required publish machine-readable files for in-network rates and out-of-network allowed amounts, enhancing transparency under the SECURE Act and Public Health Service Act.



Billing Code Identification and Rate Disclosure

Key Steps for Transparency

- **Step 1: Identify Coverage Options**: Begin by identifying the name and plan identifier for each coverage option. Use the HIOS identifier or EIN as applicable.
- **Step 2: Identify Covered Items and Services**: Identify all covered items and services, excluding prescription drugs under fee-for-service arrangements, and ensure compliance with the Transparency in Coverage Final Rules.
- **Step 3: Billing Code Identification**: Identify the billing code, type, version, and description for each covered item or service, ensuring each amount to be reported is associated with a billing code as required by the TiC Final Rules.
- **Step 4: In-Network and Out-of-Network Rate Disclosure**: Disclose all applicable in-network rates and unique out-of-network allowed amounts and billed charges, associating each rate or amount with the relevant provider and location.

File Format Selection and Naming Convention

Finalizing Machine-Readable Files

- **Step 5: Select File Format**: Choose a non-proprietary, open-standards format for the machine-readable files, such as JSON or XML, in accordance with the TiC Final Rules and available schemas on GitHub.
- **Step 6: Naming Convention**: Use the specified naming convention for each machine-readable file, considering whether to report for a single plan or multiple plans together and creating a Table of Contents file if necessary.

Accessibility and Timeliness

- **Step 7: Website Posting**: Post the machine-readable files on a publicly available website, accessible freely without any restrictions such as user accounts or personal information submission.
- **Step 8: Monthly Updates**: Regularly update the machine-readable files monthly to reflect any changes in rates or coverage, ensuring the data remains current and accurate.

Solution: Contract for Services

Fully Insured Plans

- **Insurance Carrier** must compile and post file.

Self-Insured Plans

- **Plan Administrator (Plan Sponsor)** bares the responsibility.
- **Review your service contract.**
- **Confirm compliance.**

401(k) Eligibility for Long-Term Part-Time Employees

Expanding Access to Retirement Savings

- **SECURE Act**: The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 revolutionized 401(k) plan eligibility, particularly benefiting long-term part-time employees by providing them access to retirement savings opportunities.
- **SECURE 2.0 Eligibility Criteria**: It mandates inclusion for employees who work 1,000 hours in one year or have two consecutive years of service with at least 500 hours each year.
  - × Expanding access to those previously excluded due to hours requirements.

Vesting and Contributions for Long-Term Part-Time Employees

Equality in Retirement Savings

- **Contributions**: Once eligible, long-term part-time employees can contribute to the 401(k) under the same conditions as full-time employees
- **Vesting Schedule**: Employee contributions are immediately vested. Employer contributions, **if offered**, follow the plan's vesting schedule.
  - × Aligns part-time employees' benefits with those of full-time employees.
  - × Employer contributions (matching or nonelective) are not required.

Exclusions from Testing for Long-Term Part-Time Employees

Simplifying Plan Compliance

- **Nondiscrimination and Coverage Testing**: The SECURE Act permits employers to exclude long-term part-time employees from nondiscrimination and coverage testing.
- **Impact on Plan Compliance**:
  - × Easier inclusion of long-term part-time employees.
  - × Will not result in testing failures.

Administrative Considerations and Employee Notification

Ensuring Inclusive Participation

- **Tracking Hours and Eligibility**: Employers must accurately track part-time employees' hours to determine eligibility under the SECURE Act, potentially requiring updates to HR and payroll systems.
- **Notification and Enrollment**: Employers are responsible for notifying eligible long-term part-time employees about their 401(k) plan options, including enrollment procedures, investment choices, and details on any employer matching contributions, if any.

Thank you for attending.