

# LABOR & EMPLOYMENT LAW UPDATE



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# TOPICS

- Defining “Supervisor”
- Workplace Bullying
- Background Checks
- Pregnancy Discrimination
- Sexual Orientation
- Religious Discrimination
- Americans with Disabilities Act
- Immigration
- Social Media
- OSHA
- Supreme Court Update
- Minimum Wage
- Obamacare

# *“SUPERVISOR” UNDER TITLE VII*

- *Vance v. Ball State University (2013)*

- *Who Qualifies?*

- *Fantasy vs. Reality*



# ***“SUPERVISOR” UNDER TITLE VII***

- **Supreme Court’s decision**
- **New definition for “supervisor”?**
- **How it will help employers**
- **Titles and job descriptions v. Realities**

# *PROVING A TITLE VII RETALIATION CLAIM*

- *University of Texas Southwestern Medical Center v. Nassar (2013)*



- **Mixed-Motive Standard vs. “But For”**

# *WORKPLACE BULLYING*

- Targeting the weak
- Targeting the different
- Sudden change
- Stalking
- Assault/battery



# *WORKPLACE BULLYING*

- Florida was the 23<sup>rd</sup> to introduce the “Healthy Workplace Act”
  - Senate and House Bills died in committee



# ***WORKPLACE BULLYING***

- **Institute Anti-Bullying Policies**
- **Provide regular workplace anti-bullying training**
- **Enforce the policies consistently**



# *BACKGROUND CHECKS*

**Key – Is the information equally relevant?**

- **Criminal History**
- **Credit History**
- **Arrest History (no conviction)**
  - State and federal regulators have warned employers to either ignore this information altogether, or
  - Use it merely as a basis to ask an applicant for more detail about the events surrounding the arrest

# ***BACKGROUND CHECKS***

## ***Are You Risking a Lawsuit?: Ask Three Questions***

- **Question #1 – Is all available information equally relevant in selecting a candidate?**
- **Question #2 – Do you have valid reasons to order background checks?**
- **Question #3 – Are you making appropriately tailored assessments of unsuitability?**

# ***PREGNANCY DISCRIMINATION***

- EEOC focusing on pregnancy discrimination
- Pregnancy Discrimination Act (PDA)
- Pregnancy also protected by Title VII and the FMLA
- 2012: EEOC received 3,745 complaints

# ***PREGNANCY DISCRIMINATION***

## Recent cases:

- ***EEOC v. Reed Pierce's Sportsman Grille***
- ***EEOC v. Engineering Documentation Systems***
- ***EEOC v. Adventures in Learning Aurora, Inc.***
- ***EEOC v. Platinum P.T.S.***

# SEXUAL ORIENTATION / GENDER IDENTITY

- EEOC thinks Title VII protects sexual orientation & gender identity
- *Couch v. Department of Energy* (Aug. 13, 2013)
- EEOC concluded that “Title VII’s prohibition on the basis of sex includes discrimination on the basis of ‘gender’ . . . [and] failure to conform to gender-based expectations.”
- EEOC decisions only protect federal workers

# *SEXUAL ORIENTATION / GENDER IDENTITY*

- The EEOC isn't alone – Fifth Circuit adopts similar stance regarding gender stereotypes
- “Macho Man Discrimination”
- Private employer / employee
- Not law in Florida or 11<sup>th</sup> Circuit

# *SEXUAL ORIENTATION / GENDER IDENTITY*

- **Employment Non-Discrimination Act (ENDA)**
  - Bans workplace discrimination on the basis of gender identity and sexual orientation
  - Nov. 7, 2013: Passed U.S. Senate
  - Chances for House passage?



# *SEXUAL ORIENTATION / GENDER IDENTITY*

- Potential impact on employers?
- Whether through Title VII or new federal legislation, federal trend is favoring protecting sexual orientation and gender identity in the workplace
- Considerations



# *RELIGIOUS ACCOMMODATIONS*

## ■ 10-Second Primer on the Law

- Interactive process
- Reasonable accommodation?
- Avoid discrimination



# *EEOC's ADA UPDATES*

- **Refresher – Good ADA practices**
  - **Medical Inquiries**
  - **Confidentiality**
  - **Safety**

# *PRESUMED DISABILITIES*

- What does the EEOC presume?
  - Cancer
  - Diabetes
  - Epilepsy
  - Intellectual disabilities

# ***GINA: DON'T ASK ABOUT MY GENES***

- **Genetic Information Nondiscrimination Act (2008)**
- **What does “genetic information” mean?**
  - Genetic testing and information about prior or present diseases of
  - Employees, applicants, and their families
  - Family members includes relatives up to the 4<sup>th</sup> degree
- **EEOC has started pursuing employers**

# ***GINA: DON'T ASK ABOUT MY GENES***

- **Fabricut, Inc. (Tulsa, Oklahoma)**
- **EEOC claimed Fabricut committed genetic discrimination when it asked potential hire for her family medical history in its post-offer medical examination**
- **Outcome?**

# *ADA STRESS CLAIMS*

- Covered disabilities under the ADA
- What if an employee requests an accommodation due to “chronic stress”?
- Particularly if the stress is from work?

# ADA STRESS CLAIMS

- *Huiner v. Arlington School District* (Sept. 26, 2013)
  - Federal District Court in South Dakota
- School teacher
- Diagnosis → anxiety and depression over her concern about getting fired
- Physician assistant's recommended accommodations?

# ***ADA AND FOOD ALLERGIES***

- **Is a food allergy considered a disability under the ADA?**
- **A: It depends.**
  - A disability as defined by the ADA is a mental or physical impairment that substantially limits a major life activity, such as eating.
  - Major life activities also include major bodily functions, such as the functions of the gastrointestinal system.



# *ADA AND FOOD ALLERGIES*

- Lesley University (MA, 2013)
- Access to Education Issue
- Reasonable Accommodations
- Future Impact?



# IMMIGRATION: “NO MATCH” LETTERS

- Mismatches could be due to:

- Misspellings
- Transposed numbers
- Name changes
- False SSNs
- Identity theft



- The no-match letter will make no statement about an employee’s immigration status, but the employer **MUST** respond & proceed cautiously ...

# *IMMIGRATION: “NO MATCH” LETTERS*

Have a plan for “No Match”:

1. Check employment records
2. Respond to the letter
  - DO NOT ignore the letter.

# SOCIAL MEDIA



# *SOCIAL MEDIA*

## ■ Implement a policy

- Adhere to all applicable conduct policies
- You are responsible for your actions
- Be a “scout” for compliments and criticism
- Let the subject matter experts respond to negative posts
- Be conscious when mixing your business and personal lives.

# *SOCIAL MEDIA ~ SB 198*

- Proposed Bill Prohibits Employers from:
  - (a) Requesting or requiring that an employee or prospective employee disclose a username, password, or other means of access to a social media account through an electronic communications device;
  - (b) Requesting or requiring an employee or prospective employee take action that allows the employer to gain access to the employee's or prospective employee's social media account if the account's contents are not available to the general public;
  - (c) Retaliating against an employee for refusing to give the employer access to the social media account; and
  - (d) Failing or refusing to hire a prospective employee as a result of a prospective employee's refusal to allow the employer access to the prospective employee's social media account.

# *OSHA ~ PROPOSED RULE*

- Filed November 7, 2013
- 29 CFR Parts 1904 and 1952
  - Impacts Reporting
  - Intent in Question
  - Adds Requirements for Submission of Injury and Illness

# *SUPREME COURT WATCHING*

- *Sandifer v. U.S. Steel Corporation*
  - Oral argument: Nov. 4, 2013

- Issue

- Facts of the Case

- Potential Impact





# *SUPREME COURT WATCHING*

- *NLRB v. Noel Canning*

- Oral argument: TBD

- Issue

- Facts of the Case

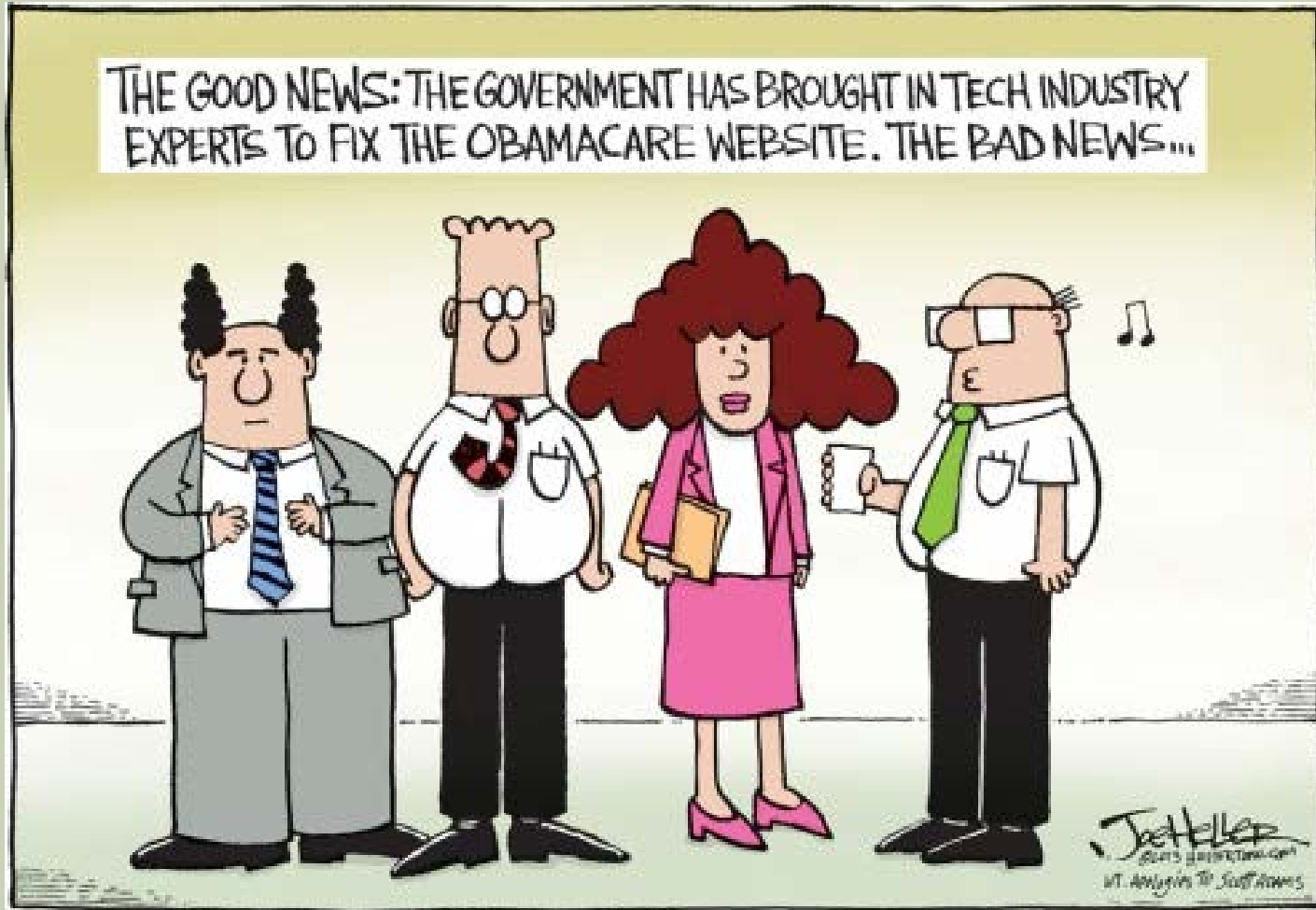
- Potential Impact



# *MINIMUM WAGE INCREASE*

- Effective January 1, 2014
- \$7.93 per hour
- Florida Department of Economic Opportunity calculates each year
- Tipped Employees

# OBAMACARE



# *CONTACT INFORMATION*

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